Office-Supreme Court, U.S.
FILED
AUG 7 1962
JOHN F. DAVIS, CLERK

No. 307

Supreme Court of the United States

OCTOBER TERM, 1962

CONSOLIDATED ROCK PRODUCTS COMPANY and VALLEY REAL ESTATE COMPANY, *Appellants*,

v.

CITY OF LOS ANGELES, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

JURISDICTIONAL STATEMENT

HOWARD C. WESTWOOD
CHARLES A. MILLER
701 Union Trust Building
Washington 5, D. C.

DONALD J. DUNNE
215 W. Seventh Street
Los Angeles 14, California

Attorneys for Appellants Consolidated Rock Products Co. and Valley Real Estate Co.

COVINGTON & BURLING
Of Counsel

August 7, 1962

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Questions Presented	5
Statement	5
The Questions Presented Are Substantial	13
I. Zoning Ordinances Which Prohibit the Only Economic Use of Land and Thereby Altogether Destroy Its Economic Value Accomplish a Taking of Property Without Compensation in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution	13
II. Zoning Ordinances Which Prohibit the Only Economic Use of Land and Thereby Altogether Destroy Its Economic Value Despite the Absence of Any Adverse Effect Such Use Would Have on Other Persons or Property Constitute an Arbitrary and Unreasonable Exercise of the Police Power of a State in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution	19
Conclusion	24
Appendix A—Opinion of the Supreme Court of California	1a
Appendix B—Opinion of the District Court of Appeal, Second District	22a
Appendix C—Opinion of the Superior Court in and for the County of Los Angeles	35a
Appendix D—Judgment of the Supreme Court of California	50a

CITATIONS

Cases:

Delaware, L. & W. R.R. v. *Town of Morristown*, 276 U.S. 182 (1928)	17
Goldblatt v. *Town of Hempstead*, 369 U.S. 590 (1962)	3, 12, 16, 19, 21, 22
Griggs v. *Allegheny County*, 369 U.S. 84 (1962)	18
Hadacheck v. *Sebastian*, 239 U.S. 394 (1915)	16

Page

Independent Warehouses, Inc. v. *Scheele*, 331 U.S. 70 (1947) .. 3
Jamison v. *Texas*, 318 U.S. 413 (1943) 3
Nectow v. *City of Cambridge*, 277 U.S. 183 (1928) 3, 20
Poulos v. *New Hampshire*, 345 U.S. 395 (1953) 3
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) ..12, 15, 17
United States v. *Causby*, 328 U.S. 256 (1946) 18
United States v. *Central Eureka Mining Co.*, 357 U.S. 155 (1958) 15, 16
United States v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950) 18

Statutes:

Housing Act of 1961, 75 Stat. 183, 42 U.S.C.A. §§ 1500-1500(e) (Supp. 1961) 13
Los Angeles, Cal., Municipal Code, Ch. 1, Art. 2, §§ 12.05-.07, 12.20, 12.21; Art. 3, § 13.03 .....3, 4, 7, 21
Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 61, § 19 24

Miscellaneous:

Hearings on Various Bills to Amend The Federal Housing Law Before a Subcommittee of the Senate Committee on Banking and Currency, 87th Cong., 1st Sess. (1961) 15
U.S. Bureau of Mines, Dep't of the Interior, 1960 Mineral Yearbook, Vol. 1, *Sand and Gravel* (Preprint: 1961) 15
San Mateo County Planning Comm'n., *Methods of Preserving Open Spaces* (Dec. 1959) 15
Whyte, *Securing Open Space for Urban America: Conservation Easements* (Urban Land Inst. Tech. Bull. No. 36, 1959) 24
Wright, *Open Space and Density Control* (Prepared for Graduate Course in City Planning, Case Institute of Technology: 1961) 14
Dunham, *A Legal and Economic Basis for City Planning*, 58 Column. L. Rev. 650 (1958) 24
Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. Pa. L. Rev. 179 (1961) 24
Note, 75 Harv. L. Rev. 1622 (1962) 24

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JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Supreme Court of the State of California sustaining the validity of city ordinances against a challenge to their constitutionality as applied to the property involved in this case.

OPINIONS BELOW

The opinion of the California Supreme Court and the opinion of the two dissenting justices are reported in 57 Advance California Reports 557, 370 P. 2d 342 (1962), and are set forth in Appendix A hereto. The opinion of the District Court of Appeal, Second District, is reported in 15 Cal. Rptr. 775, and is set forth in Appendix B hereto. The memorandum decision of the Superior Court in and for the County of Los Angeles is not reported. It is included at pages 81-96 of the certified transcript of record,[1] and is set forth in Appendix C hereto.[2]

JURISDICTION

This action was commenced by a complaint for declaratory and injunctive relief (Tr. 1-28) praying that appellee City of Los Angeles be enjoined from enforcing several ordinances which prohibit appellants from using certain real property for any purpose other than specified agricultural and residential uses. Among the grounds asserted for the relief requested was that these ordinances, insofar as they prohibit appellants from using their land for the only purpose for which it has economic value—the excavation and processing of rock, sand and gravel—violate Section 1 of the Fourteenth Amendment to the United States Constitution in that they (a) effect a confiscatory taking of appellants' property, and (b) constitute an unreasonable and arbitrary exercise of the police power. (Tr. 18-20).

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[1] Hereinafter references to the record in the court below are cited "Tr. ——."

[2] The trial court also made findings of fact and conclusions of law the full text of which are set forth in the transcript of record (Tr. 44-59).

The Superior Court, after trial, denied the requested relief. The District Court of Appeals unanimously reversed the trial court. The Supreme Court of California, over the dissent of two justices, affirmed the Superior Court.

The final judgment of the California Supreme Court was dated and entered on April 12, 1962, and is set forth in Appendix D hereto. The order of the California Supreme Court denying appellants' timely petition for rehearing was dated and entered on May 9, 1962. (Tr. 983). The notice of appeal was filed with the California Supreme Court on June 8, 1962. (Tr. 985-92).

Jurisdiction to hear the appeal is conferred on this Court by 28 U.S.C. § 1257(2). The following cases sustain the jurisdiction of this Court:

Nectow v. *City of Cambridge*, 277 U.S. 183 (1928);
Jamison v. *Texas*, 318 U.S. 413-414 (1943);
Independent Warehouses, Inc. v. Scheele, 331 U.S. 70, 79 (1947);
Poulos v. *New Hampshire*, 345 U.S. 395, 402 (1953);
Goldblatt v. *Town of Hempstead*, 369 U.S. 590 (1962).

STATUTES INVOLVED

Chapter 1, Article 2 of the Los Angeles Municipal Code is the City's Comprehensive Zoning Plan.[4] It divides the City into various zones and enumerates the uses that may be made of property in such zones. Those of its provisions challenged on this appeal are:

Sec. 12.21(A)(1)—"No building or structure shall be erected, reconstructed, structurally altered, enlarged, moved, or maintained, nor shall any building, structure or land be used or designed to be used for any use other than is permitted in the zone

in which such building, structure or land is located and then only after applying for and securing all permits and licenses required by all laws and ordinances."

Sec. 12.05—"The following regulations shall apply in the 'A1' Agricultural Zone; A. No building, structure or land shall be used and no building or structure shall be erected, structurally altered, enlarged, or maintained, except for the following uses, and when a 'Supplemental Use District' is created by the provisions of Article 3 of this Chapter, for such uses as may be permitted therein:"

[There follows the list of permissible uses in A1 Agricultural Zones.]

Sec. 12.06—[This section establishes the A2 Agricultural Zone. It contains the same provision as the one quoted above for A1 Agricultural Zones but has a different list of permissible uses.]

Sec. 12.07—[This section establishes the RA Suburban Zone. It contains the same provision as the one quoted above for A1 Agricultural Zones but has a different list of permissible uses.]

Chapter 1, Article 3 of the Los Angeles Municipal Code concerns the establishment of Supplemental Use Districts. Section 13.03 thereof, whose validity is challenged on this appeal, provides in relevant part:

Sec. 13.03(C)(1)—"The production of rock and gravel shall be permitted only in the districts established and described in Paragraph 2 of this Subsection and in such additional districts as may be established pursuant to Paragraph 3 of this Subsection."[3]

[3] The complete text of the Comprehensive Zoning Plan and the provisions relating to Supplemental Use Districts is contained in Plaintiff's Exhibit 60, which is part of the record on appeal.

QUESTIONS PRESENTED

1. Whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation therefor in violation of the Due Process Clause of the Fourteenth Amendment?

2. Whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable, where that use will not adversely affect the health, safety or welfare of other persons or property, constitute arbitrary and unreasonable exercises of the state police power in violation of the Due Process Clause of the Fourteenth Amendment?

STATEMENT

The trial court's findings of fact and memorandum decision disclose these facts concerning the nature of the land involved in this case (hereinafter called the subject property):

The subject property is 348 acres located in the San Fernando Valley in the City of Los Angeles. Originally the land was part of a larger parcel, owned by appellant Valley Real Estate Company or its predecessors in interest since 1899 (Tr. 93, 44, 2), and under lease to appellant Consolidated Rock Products Company or its predecessors since 1909. (Tr. 45-46). In 1939 the larger parcel was divided in two when a center portion was condemned by the Los Angeles County Flood Control District in order to construct the Hansen Dam and flood control basin. (Tr. 45). Prior to this division the predecessor of appellant Consolidated Rock Products Company had engaged in

excavation and processing of rock, sand and gravel on the entire property. (Tr. 46). Since the division excavation and processing activities have continued on the half of the original parcel lying below the dam. (Tr. 45-46). That land is not involved in this appeal. The half lying above the dam is the subject property.

The subject property is substantially the apex of the Tujunga Cone, the second largest alluvial cone of rock, sand and gravel in Los Angeles County. The alluvial deposits on the land are about 40 feet in depth. (Tr. 47). The Tujunga Cone is generally known as the Tujunga Wash. (Tr. 47). The subject property is the channel through which the waters of the Tujunga Wash flow. (Tr. 46). The land is situated in a natural amphitheater surrounded by forests, high hills and cliffs, the Tujunga Canyon, and the Hansen Dam and its debris basin. (Tr. 14-15, 53). The evidence discloses that except for a small protruding portion in the southeast corner the subject property lies about one-half mile from the outskirts of the residential community of Sunland-Tujunga to the southeast of the subject property. (Pl. Exs. 61, 84). Within 300 feet of the border of the land—a perimeter of some five miles—there are no more than 34 residences. (Tr. 53, 15). The surface of the land is rough and uneven, and scoured by irregular water courses. (Tr. 47). The land is subject to overflow of water and periodic flooding in times of heavy rainfall. During heavy floods hundreds of thousands of tons of boulders, rocks and other debris regularly have been washed and deposited on it. (Tr. 46). This condition cannot be alleviated except by the expenditure of prohibtive amounts of money in the building of a flood control channel. (Tr. 47-48).

Although privately owned and not a part of the publicly owned debris basin, the subject property aids the flood control system of the Hansen Dam by acting as a detritus spreading ground and retarding basin for flood waters flowing to the dam. (Tr. 48). This function would not be disturbed by rock, sand and gravel operations thereon. (Tr. 530-31). Rock, sand and gravel operations are presently conducted on other land adjoining the subject property. (Tr. 46, 4).

The Comprehensive Zoning Plan of the Los Angeles Municipal Code placed a portion of appellants' property in the A1 Agricultural Zone, another portion in the A2 Agricultural Zone, and a small portion in the RA Suburban Zone. (Tr. 50). These classifications restrict the use of the property to specified agricultural or limited residential uses. (Pl. Ex. 60, Los Angeles Municipal Code, Sec. 12.05-12.07, *supra*, p. 4). Other uses of the land are expressly prohibited. (*Id.*, Sec. 12.21, *supra*, pp. 3-4). Quarrying activities ordinarily are permitted only in Heavy Industrial Zones. (*Id.*, Sec. 12.20). However, the Plan also provides for the establishment of Rock and Gravel Districts in any zone where required by the public convenience, necessity or general welfare. (Sec. 13.03, *supra*, p. 4. The full text of this section appears in plaintiff's Exhibit 60).

Pursuant to the procedure established in the Los Angeles Municipal Code, appellants applied in 1957 to have the subject property designated a Rock and Gravel District. During the course of the hearings on that application it appeared that the City Department of Recreation and Parks desired to investigate the possibility of acquiring the land for park purposes, in view of a recently approved bond issue. Appellants

agreed to withdraw their application without prejudice in order to afford the civic officials time to study the possibilities of acquisition. (Def. Ex. A, transcript of hearing before City Planning Commission Examiner, pp. 9-11). Thereafter the City Planning Commission voted to include the land on the City's Master Plan of Parks as a monument or preserve, the County Regional Planning Commission approved inclusion of the land as a reservation on the Regional Recreation Area Plan of the County, and the County Board of Supervisors affirmed its intent that future development of the land be on a co-operative basis with the City. (Def. Ex. A, Report of Examiner Wayman to City Planning Commission, pp. 6, 10-11; Tr. 390-91, 392-93). However, no funds were committed for acquisition of the land, and at no time has there been any indication that the expenditure of public funds to acquire the property is contemplated. (Tr. 393; Def. Ex. A, Transcript of Hearing before City Planning Commission Examiner, pp. 8, 11). Therefore, appellants renewed their application to have their property designated a Rock and Gravel District. A public hearing was held by an Examiner of the Commission during which a large amount of "evidence" was received from opponents of the application directed to the proposition that appellants' land should be maintained in its existing state as a natural preserve, or developed as a park for recreational purposes, rather than be excavated as proposed by appellants. The Examiner recommended disapproval of appellants' application. The Planning Commission, after reviewing the record and hearing the opponents, recommended that it be approved. (Def. Ex. A, Minutes of Meeting of City Planning Commission, Aug. 21, 1958). However, the Los Angeles City Council

denied the application. (Def. Ex. C, Minutes of Meeting of City Council, Nov. 18, 1958). Thereupon appellants instituted this proceeding.

Appellants' complaint sought an injunction against the enforcement of the provisions of the Los Angeles Municipal Code that prohibit rock, sand and gravel operations on their property, on the ground that those provisions, as applied to appellants' property, are unreasonable, arbitrary, and oppressive, and confiscate appellants' property, in violation of the Fourteenth Amendment to the United States Constitution. (Tr. 1-34). The particular allegations that challenged the constitutionality of the ordinances as applied to appellants' property were contained in Count XXV of the complaint. (Tr. 18-20).

Appellants' suit was an action in equity, and required a trial *de novo*. The trial court, which not only received evidence by testimony and exhibits but also made a personal inspection of the property pursuant to stipulation of the parties, made comprehensive findings of fact. It was clear and emphatic in finding that the subject property has economic value only for rock, sand and gravel purposes. (Tr. 47, 48, 51). The court found that while the land has large economic value for excavation of rock, sand and gravel (the only economic use not prevented by periodic flooding) it was "preposterous" to contend that the land has any value for agricultural, residential, business, commercial or industrial uses, in view of the flood hazard and nature of the soil. (Tr. 48). It found, however, that the property does serve the function of aiding in the County's flood control system. (Tr. 48).

The trial court also found that use of the subject property for rock, sand and gravel production is in the interests of the public necessity, convenience and welfare, since the supply of rock, sand and gravel in existing Rock and Gravel Districts in the San Fernando Valley area will be depleted in about eleven years, and unless additional rock, sand and gravel is provided by the establishment of new Rock and Gravel Districts it will be necessary to import such material from distant points at an increased cost to consumers and the public. (Tr. 54).

The trial court found further that, in view of available methods of control, apprehensions that rock, sand and gravel operations would produce an appreciable quantity of dust for air-borne convection are unfounded, and there would be no adverse effect on living amenities or health conditions, or depreciation in property values, from such operations. (Tr. 50-51, 53-54). Nonetheless, though recognizing the difficulty of the conclusion, and influenced by the fact that there had been differences between the City Planning Commission Examiner, the Commission and the City Council, it concluded that reasonable minds could differ and therefore sustained the ordinances. (App. C, pp. 43a-45a; Tr. 89, 91-92).

The District Court of Appeals reversed the trial court, holding the ordinances unconstitutional as applied to appellants' property. (App. B, pp. 22a-34a). The California Supreme Court, on the City's petition, granted review and, over the dissents of two justices, affirmed the trial court, specifically upholding the constitutional validity of the ordinances, and rejecting appellants' Fourteenth Amendment contentions. (App.

A, pp. 1a-21a). A rehearing was sought in which appellants renewed their contentions that the ordinances, as applied to their property, violated the Fourteenth Amendment. (Pl. Pet. for Rehearing). The Supreme Court, with two justices dissenting, denied rehearing without opinion. (Tr. 983).

The Supreme Court's opinion recited the trial court's findings that the subject property has great value for rock, sand and gravel purposes, but, in view of the continuing flood hazard and nature of the soil, no economic value for any other purpose. (App. A, p. 2a). The court noted the trial court's finding that the Sunland-Tujunga community had a reputation as a haven for sufferers from respiratory ailments, that the possible advent of a substantial excavation operation on appellants' property had created apprehensions among the community's residents of air pollution, traffic, and other annoyances, and that a rock, sand and gravel operation on the subject property could adversely affect the reputation of the Sunland-Tujunga community as a haven for persons with respiratory ailments. (App. A, p. 3a). However, it recited the trial court's finding that rock, sand and gravel operations would not increase air pollution above accepted standards, and that such activities could be conducted on the subject property " 'with compatibility to adjacent properties and with minimal detriment to the living amenities of [sic] health conditions of the inhabitants of adjacent properties or in the general area and without probable depreciation in the value of' " adjacent property. (App. A, p. 3a).

The conclusion of the Supreme Court was that, notwithstanding the findings of fact to the contrary by the

court that actually viewed the property and heard the evidence—findings which it did not challenge in any way—there was some evidence that dust would be carried into the Sunland-Tujunga community with adverse effects thereon. (App. A, p. 4a). It, too, referred to the fact that there were different judgments by the City Planning Commission and the City Council, so that " 'reasonable minds might differ.' " (App. A, p. 5a, n. 1). Since the court thought that some evidence to support the legislative judgment appeared in the record it deemed the inquiry at an end. (App. A, p. 17a). As we shall see (*infra*, p. 23), the court's view of the evidence was erroneous. In any case, the court failed to make the inquiry required of it by this Court's decision in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962).

The California Supreme Court did not find it necessary to decide whether appellants' property had been "taken" by the challenged ordinances. Rather, it appeared to adopt the view that this question was irrelevant, since the ordinances could be sustained as valid exercises of the police power. In the course of its opinion the court suggested that the principle of *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), that legislative regulation of rights in real property may be so drastic as to constitute a taking, and thus require compensation of the property owner, was "inapplicable to comprehensive zoning." (App. A, pp. 13a-14a).

The decision below betrays these fundamental faults:

1. It assumes that any restraint on the use of real property may be imposed without compensation although it amounts to a taking, if the restraint is "reasonable" in the sense that it is within the state's power to impose.

2. It appears to base this assumption on the novel proposition that the constitutional requirement of compensation for a taking of property by a public body is inapplicable to comprehensive zoning.

3. It determines the "reasonableness" of zoning ordinances which are completely destructive of the value of property on the basis that there was some evidence of facts which might support the ordinances (notwithstanding the trial court's finding that the facts were otherwise) without considering whether such facts would justify the drastic results inflicted by the ordinances.

And underlying all is the City's determination that appellants' property shall be a natural preserve, a result that is accomplished by the decision below without compensation.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

ZONING ORDINANCES WHICH PROHIBIT THE ONLY ECONOMIC USE OF LAND AND THEREBY ALTOGETHER DESTROY ITS ECONOMIC VALUE ACCOMPLISH A TAKING OF PROPERTY WITHOUT COMPENSATION IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.

"Open Space" programs—the setting aside of land in the interests of aesthetics, conservation and orderly growth—has become a prime goal of city planners. In recognition of the importance these programs have assumed, the Congress, in response to the President's request, adopted in its last session a program for federal grants to assist local bodies in acquiring open space. (Housing Act of 1961, 75 Stat. 183, 42 U.S.C.A.

§§ 1500-1500(e) (Supp. 1961)). Implicit in this legislation is congressional acknowledgment that in many circumstances the preservation of land as open space results in its donation to the public domain, which can be accomplished constitutionally only by making compensation to its owners.

The City of Los Angeles in the present case has violated that constitutional requirement. By virtue of its ordinances, which prohibit the only economic use of which the subject property is capable, it has determined that this property must remain "open"—committed to the public domain—for the benefit of the surrounding community. But the City has not provided appellants with compensation for this taking.

The facts of the case that bear on this matter are shortly stated. Appellants' property has economic value only for the excavation of rock, sand and gravel. Its particular location in the center of a flood wash makes it unusable for any other purpose, particularly agriculture or residences. The ordinances here challenged prohibit the only use that can be made of the land, and, after vociferous demands of the local citizenry that the land be maintained in its present state as a natural preserve or park area, the City has refused appellants' application to engage in excavation operations. Various local governmental bodies have concluded that appellants' land should be kept as a natural preserve, but no funds have been made available to compensate appellants. Instead, the desired goal is achieved, at no cost to the City, through the prohibitory zoning ordinances.[4]

[4] It may be noted that some communities consider rock, sand and gravel excavation as a primary use of land preserved as open space. (Tr. 286-87); Wright, *Open Space and Density Control* 21-22, 26-27

In California "zoning land exclusively agricultural is the major way in which zoning regulations have been used to preserve open space. . . ." San Mateo County Planning Commission, *Methods of Preserving Open Spaces* 6 (Dec. 1959). No doubt agricultural zoning is a valid method of attaining this end where agricultural uses of the land are appropriate or reasonable. However, as the present case indicates, the attractiveness of this technique can lead to abuses whereby land totally incompatible with agricultural uses is nevertheless zoned for such uses in an effort to preserve open space. This misuse of the zoning power results in the entire burden of community betterment being placed on individual landowners, contrary to the constitutional prohibition against taking property for public use without compensation. Such abuse of the zoning power has alarmed many advocates of urban planning. See, *e.g.*, the testimony of William H. Whyte, Jr., in *Hearings on Various Bills to Amend the Federal Housing Law Before a Subcommittee of the Senate Committee on Banking and Currency*, 87th Cong., 1st Sess. 1002-1004.

There can be no question that state action affecting real property short of an outright dispossession may be so burdensome and complete as to deprive the owner of all use and enjoyment of it, and amount to a taking in the constitutional sense. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922); *United States* v. *Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958);

(Prepared for Graduate Course in City Planning, Case Institute of Technology: 1961). And, as the Bureau of Mines has recognized, considerable benefits are offered by quarried properties as sites for sanitary landfill and recreation areas after the exhaustion of their deposits. *U.S. Bureau of Mines, Dept. of Interior, 1960 Minerals Yearbook* Vol. 1, *Sand and Gravel* 19 (Preprint: 1961).

Goldblatt v. *Town of Hempstead*, 369 U.S. 590, 594 (1962). In the *Central Eureka* case this Court said:

> "Traditionally, we have treated the issue as to whether a particular governmental restriction amounted to a constitutional taking as being a question properly turning upon the particular circumstances of each case. [citing *Pennsylvania Coal Co.* v. *Mahon*]. In doing so, we have recognized that action in the form of regulation can so diminish the value of property as to constitute a taking." 357 U.S. at 168.

It is true that not every regulation of property accompanied by a reduction in its value amounts to a taking. The fact that a local ordinance prohibits one use of land while permitting other less profitable uses does not necessarily entitle the landowner to compensation. See *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915). But that is not this case. Here, the core of the controversy, as disclosed by the record of proceedings before the City Planning Commission and the City Council, was whether the land was to be devoted to a private use—the excavation of rock, sand and gravel—or maintained as a natural preserve for the public benefit. (Def. Exs. A, C). The City chose the latter alternative, and thereby effected as complete a "taking" of appellants' property as if it had physically dispossessed appellants and formally declared the property to be a natural preserve.

The California Supreme Court failed to come to grips with the taking question. Instead, it disposed of appellants' contentions on this phase of the case with this ambiguous quotation from one of its earlier decisions:

> "'. . . the very essence of the police power as differentiated from the power of eminent domain is that

> the deprivation of individual rights and property cannot prevent its operation; once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law.'" (App. A, p. 15a).

It is clear that this statement begs the central question whether the City's ordinances effect a taking of appellants' property. As Mr. Justice Holmes wrote in the landmark case:

> ". . . some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 413 (1922).

In other words, even though a prohibition on the use of property may be valid, the effect of the prohibition on the property owner may be so severe as to require that he be compensated. *Delaware, L. & W. R.R.* v. *Town of Morristown*, 276 U.S. 182 (1928). Refusing to recognize this principle, the California Supreme Court simply thrust the taking question out of this case. But the Constitution will not permit it thus to be cast aside.

The lower court's mishandling of the taking question is indicated by its confusing statement that there was testimony before the legislative body that the subject property could be successfully devoted to certain uses other than excavation of rock, sand and gravel. (App. A, p. 15a). This was accompanied by the confession that the flood waters would inhibit any such uses.

(*Ibid.*). But, in any event, the court was plainly mistaken. There was no testimony before the City Planning Commission or the City Council concerning possible uses of the property, other than for excavation, or as a park or natural preserve. (Def. Ex. A, Transcript of Hearing before City Planning Commission Examiner; Minutes of Meeting of City Planning Commission, Aug. 21, 1958; Def. Ex. C, Minutes of Meeting of City Council, Nov. 18, 1958). The court presumably had reference to testimony of the City Planning Commission Examiner at the trial in this case. That testimony was simply that other enumerated uses were *permissible* under the zoning ordinances. (Tr. 851). In view of the nature of the land, and the periodic devastation of flood waters, testimony that it *could* in fact be used for any purpose other than for excavation would not be credible, as the trial judge, who actually viewed the land, made quite clear.[5] In any case, even if there had been such testimony before the legislative body, it would not be dispositive of the question whether the challenged zoning ordinances effect a taking of appellants' land, for that question is a judicial one to be decided by an appropriate judicial tribunal. That is the teaching of cases like *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799 (1950), and *United States* v. *Causby*, 328 U.S. 256 (1946), reiterated the other day in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962).

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[5] There was testimony at the trial that the land might be used to raise chickens (if the land were cheap enough and water were available) (Tr. 761), or for horse stables or a cattle feed lot. (Tr. 871-73). What the trial court thought of the credibility of this testimony is indicated by the trial transcript (Tr. 762, 875) as well as its finding that such statements were "preposterous." (Tr. 48).

In this case the basic facts were established at the trial, and found by the trial court. The California Supreme Court did not challenge them. The value of appellants' property was destroyed by the application of the city ordinances. This amounts to a taking, and appellants are entitled to compensation. The failure of the California Supreme Court so to hold requires that this Court reverse the judgment below.

II.

Zoning Ordinances Which Prohibit the Only Economic Use of Land and Thereby Altogether Destroy Its Economic Value Despite the Absence of Any Adverse Effect Such Use Would Have on Other Persons or Property Constitute an Arbitrary and Unreasonable Exercise of the Police Power of a State in Violation of the Due Process Clause of the Fourteenth Amendment to the Constitution.

Apart from the taking question, the ordinances cannot stand. Their strictures are too severe to be sustained by the meager justification offered in their support.

Last Term, in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962), this Court reiterated the standard by which encroachments on property interests by a local governmental body are tested under the Due Process Clause of the Constitution. Mr. Justice Clark wrote for a unanimous Court:

> "The classic statement of the rule in *Lawton* v. *Steele*, 152 U.S. 133, 137 (1894), is still valid today:
>
> > 'To justify the State in . . . interposing its authority in behalf of the public, it must appear,

> first, that the interests of the public . . . require such interference; and second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'
>
> Even this rule is not applied with strict precision, for this Court has often said that 'debatable questions as to reasonableness are not for the courts but for the legislature. . . .' *E.g., Sproles* v. *Binford*, 286 U.S. 374, 388 (1932).
>
> "The ordinance in question was passed as a safety measure, and the town is attempting to uphold it on that basis. To evaluate its reasonableness we therefore need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance." 369 U.S. at 594-95.

The record in *Goldblatt* was insufficient to permit this Court to evaluate the reasonableness of the ordinance in question as applied to the appellant's property. In the instant case the facts are developed fully and completely in the record. Those facts bring the case squarely within the holding of *Nectow* v. *City of Cambridge*, 277 U.S. 183, (1928). There the Supreme Judicial Court of Massachusetts had upheld a zoning ordinance as applied to certain land despite findings by a special master that the public health, safety, morals or welfare were not promoted by the use restrictions, and that the restrictions precluded any practical use of the property. Although this Court recognized the usual reluctance of the judiciary to interfere with legislative zoning judgments, it reversed, noting:

> "that the invasion of the property of the plaintiff in error was serious and highly injurious is clearly

established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained." 277 U.S. at 188-89.

In the present case the City has employed an artificial classification, bearing no rational relation to the possible uses of the land, in order to maintain it as a natural preserve. It is true that this drastic action will dispel any apprehensions in the neighboring area that appellants' rock, sand and gravel operations might be objectionable. But it is manifest that the unfounded apprehensions of local citizens cannot sustain so complete a destruction of appellants' property interests. That these fears are unfounded is established by the trial court's findings, after considering the full record and viewing the property, that the actual possibilities of any adverse effects from appellants' rock, sand and gravel operations are minimal, and that the operations could be conducted without probable depreciation in the value of adjacent property. (*Supra*, p. 10; Tr. 53-54).

While a complete prohibition on use is the simplest means of eliminating local apprehensions, the command of the Constitution precludes the use of shortcuts where they result in the total destruction of an individual's property interests, particularly when there are less onerous but effective techniques of alleviating the community's concern. *Goldblatt v. Town of Hempstead, supra.* Here the outskirts of the built-up portion of the Sunland-Tujunga community are about one-half mile from the major portion of appellants' 348-acre tract. Moreover an existing ordinance (Los Angeles Municipal Code, Section 13.03(D)(1), Pl. Ex. 60) imposes

many restrictions on excavation operations, among them a prohibition against excavation within a certain distance from the boundary lines of the land of others. In addition, the City Council may adopt other regulations if it reasonably concludes that they are needed for the protection of the Sunland-Tujunga community. The City Planning Commission Examiner recommended several restrictions on appellants' operations in addition to those imposed by the Los Angeles Municipal Code in the event their application should be granted. For example, he recommended that appellants be permitted to excavate the mineral products, but not engage in any crushing or other processing on the property; that all excavation be in strict compliance with the requirements of the Los Angeles County Air Pollution Control District; that all driveways between the plant site and the paved street be paved to support heavy traffic and avoid dust; and that detailed operating plans be submitted to the interested local agencies for approval before any excavation is commenced. (Def. Ex. A, Report of Examiner Wayman to City Planning Commission, pp. 12-14). The California Supreme Court failed to consider those recommendations in adjudging the validity of the City's ordinances. Its opinion will be searched in vain for an analysis of the availability and effectiveness of less drastic protective steps. The necessity of such an analysis was made clear by this Court last Term in *Goldblatt* v. *Town of Hempstead*, 369 U.S. at 595.

In the face of the trial court's findings that apprehensions of the local citizens were unfounded, the California Supreme Court sought to sustain the City's ordinances on the ground that there was evidence that dust from appellants' operations would be carried in

appreciable amounts to the Sunland-Tujunga area with resulting detriment to the inhabitants and damage to property values. It apparently was the court's view that since there was some such evidence, the legislative body might validly impose the prohibition on all rock, sand and gravel operations.

But the evidence referred to by the court does not substantiate its statement.[6] Furthermore the record does show that whether there would in fact be detriment to others was "of no particular importance" to the legislative determination; rather, that the question for the legislative body was "what the attitude of the people that are moving into the area is going to be." (Tr. 737). In short, despite the court's statement, the real point in this case is whether the legislative body has the power to take the drastic prohibitory action here in question merely on the ground that people in a community one-half mile and more distant object. While the fact of neighboring objection is certainly pertinent in zoning problems, when it is established that apprehensions are groundless a prohibition as drastic as is that in this case cannot pass the constitutional test so recently reiterated by this Court in the *Goldblatt* case.

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[6] There was no evidence that rock, sand and gravel operations on appellants' property would produce dust in any appreciable amount that would be carried to the residential centers of Sunland and Tujunga. The evidence offered by the City dealt with the theoretical behavior of dust in the atmosphere under wind and weather conditions alleged to be typical of the Tujunga Wash area. (Tr. 703-08, 711-16). The only evidence on the effect of rock, sand and gravel activities, based on analyses of such operations conducted on adjoining property, disclosed that additional dust in the atmosphere was not conveyed in any appreciable amount beyond the boundaries of the quarried property. (Tr. 310-29, 521-23; Pl. Ex. 33).

CONCLUSION

This case raises issues of far-reaching importance concerning the power of local communities, by broad expansion of the zoning power, to enforce the donation of private property to the public domain. The constitutional limit of local power in this area is a subject of increasing significance to those who are attempting to satisfy the growing need and demand for open space in urban and suburban areas. See, *e.g.*, Whyte, *Securing Open Space for Urban America: Conservation Easements*, 21-29 (Urban Land Inst. Tech. Bull. No. 36, 1959); Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. Pa. L. Rev. 179, 190-92, 197-98 (1961); Note, 75 Harv. L. Rev. 1622 (1962).

The threat posed to the continued existence of property rights as traditionally known in this country by the use of the zoning power in the manner disclosed by this case is disturbing. This case strongly suggests that insufficient attention is being paid to the effects on private property interests of governmental prohibitions on land use. This is in marked contrast to the English approach, which by statute provides for payment of compensation to property owners whose land is rendered incapable of reasonably beneficial use by restrictions imposed in the interest of community planning. Town and Country Planning Act, 1947, 10 & 11 Geo. 6, c. 61, § 19; Dunham, *A Legal and Economic Basis for City Planning*, 58 Colum. L. Rev. 650, 665-66 (1958).

The decision of the court below opens the door to restriction on land use in the United States so drastic and so unfettered that it requires this Court's review.

Respectfully submitted,

HOWARD C. WESTWOOD
CHARLES A. MILLER
701 Union Trust Building
Washington 5, D. C.

DONALD J. DUNNE
215 W. Seventh Street
Los Angeles 14, California

Attorneys for Appellants Consolidated Rock Products Co. and Valley Real Estate Co.

COVINGTON & BURLING
Of Counsel

August 7, 1962

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

CONSOLIDATED ROCK PRODUCTS COMPANY
and VALLEY REAL ESTATE COMPANY,
Plaintiffs and Appellants,

vs.

CITY OF LOS ANGELES,
Defendant and Respondent.

L. A. 26566

Filed Apr. 12, 1962

This is an appeal from a judgment for defendant in an action seeking declaratory relief and to enjoin defendant from enforcing a zoning restriction alleged to be unconstitutional insofar as it applies to prevent rock and gravel operations on plaintiffs' property.

Plaintiff Valley Real Estate Company is the owner and Consolidated Rock Products Company is the lessee of 348 acres of land situated in the watercourse known as the Tujunga Wash, and lying northeasterly (upstream) of Hansen Dam in the San Fernando Valley. This property—about two miles long and one-quarter mile wide—runs in a generally east-west direction and is divided approximately in the center by Foothill Boulevard, a north-south roadway at that point. The property forms substantially the apex of the Tujunga Cone, the second largest alluvial cone of rock, sand and gravel in Los Angeles County. The Tujunga Wash from the eastern to the western termini of the subject property is bordered on the north by the base of the mountains and on the south by bluffs of low hills except for relatively narrow plateaus on either side above the

level of the land. The property is composed of rock, sand and gravel to a depth of about 40 feet. It is isolated from land presently being used for other purposes and is situated in a natural amphitheater surrounded by the rugged terrain of the Angeles National Forest on the north, by Tujunga Canyon on the east, by Hansen Dam and its debris basin on the west, and by high hills and cliffs on the south.

Except for the Livingston Rock and Gravel Plant on 125 acres contiguous to the westerly portion of plaintiffs' property—an operation conducted since 1931, now substantially depleted in the course of some 30 years' activity, and with but a doubtful number of remaining years left for economic extraction—rock and gravel operations in the Tujunga Wash have been confined to the area *downstream* from Hansen Dam. Since 1946 defendant City of Los Angeles has not created any new rock and gravel districts *upstream* from Hansen Dam but has specifically denied applications for such designated districts upon premises immediately adjacent to plaintiffs' property.

The twin residential communities of Sunland and Tujunga adjoin plaintiffs' property, with their mainly developed portions lying east and southeast thereof. In recent years the trend of development in these communities has been in a westerly direction toward plaintiffs' property and along and upon the bluffs north and south thereof.

Plaintiffs' property—348 acres—is zoned for agricultural and residential use; and rock, sand and gravel operations are prohibited thereon. During the trial, the trial judge pursuant to stipulation of counsel made an extensive tour of plaintiffs' property and the surrounding area.

The trial court found that the subject property has great value if used for rock, sand and gravel excavation but "no appreciable economic value" for any other purpose, and in view of the "continuing flood hazard and the nature of the soil," any suggestion that the property has economic value for any other use, including those uses for which it was zoned, "is preposterous." With respect to the effect that rock and gravel excavating operations would have on nearby residential communities, the trial court found that

the "creation of dust for air-borne convection" could be "reduced to a point of pollution below an acceptable standard," that the "inevitable" noise could be controlled to the point where it would be "minimal," that there would be no extraordinary danger to children; and in summation, that the "business of excavating . . . rock, sand and gravel and activities incidental and related thereto can be conducted on the plaintiffs' said property with compatibility to adjacent properties and with minimal detriment to the living amenities of health conditions of the inhabitants of adjacent properties or in the general area and without probable depreciation in property values to the adjacent properties."

While expressing these views on vital matters affecting the "public health" of the adjacent communities, the trial court further found that they "are all factors which, in their totality, the legislative body [the Los Angeles City Council] may properly consider and act upon" and that "reasonable minds might differ and have differed upon these" factors.[1]

The trial court also found that "the Sunland-Tujunga area . . . has a national reputation as a haven for sufferers from respiratory ailments and is inhabited by many such sufferers and that a considerable portion of its economy is based upon such reputation"; that "the possible advent of a substantial rock, sand and gravel extraction and processing operation upon the subject property has caused considerable apprehension to the residents and the communities of Sunland and Tujunga of air pollution, traffic and other dangers and annoyances as a result thereof"; and that "a rock and gravel operation upon the subject property could adversely affect the reputation of the Sunland-Tujunga area as a haven for sufferers from respiratory ailments."

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[1] The Planning Commission approved with certain recommended conditions plaintiffs' application for designation of their property as a "Rock and Gravel District"; the City Council ultimately denied such application.

There was substantial evidence that even though operated with all possible safeguards, the extraction of sand and gravel from the subject property would still create appreciable quantities of dust, which would be carried by the prevailing winds to the residences and sanitariums of Sunland and Tujunga; that this dust would have a damaging effect upon the sufferers from respiratory ailments; and also that such operations would adversely affect property values in those communities. The trial court concluded that plaintiffs' property was "not arbitrarily, capriciously or unreasonably zoned" under the ordinances prohibiting rock and gravel operations thereon; and that such zoning was "not discriminatory" nor did it offend constitutional guarantees protecting plaintiffs' property rights. (U.S. Const., Fifth and Fourteenth Amends.; Cal. Const., art. I, §§ 1, 13 and 14.) Accordingly, judgment was entered for defendant.

Plaintiffs argue that the zoning restriction in its application to their property is unconstitutional and void as being: (a) a denial of due process; (b) a denial of equal protection of the laws; (c) a taking of private property for public use without compensation; and (d) discriminatory in operation. They claim that the record clearly shows that their property is so-called "one use property," having economic value only for the excavation of rock, sand and gravel; and that under the guise of enforcing police regulations, defendant is guilty of "an unwarranted and arbitrary interference with" their constitutional right "to carry on a lawful business" so as to render their property valueless.

The trial judge in his findings and conclusions of law which he drew therefrom showed a clear recognition of the respective functions of the legislative body in enacting a comprehensive zoning ordinance and of the courts in passing upon the constitutionality of such legislation. The origin and rapid growth and acceptance of the principle of comprehensive zoning as a constitutionally valid method of the regulation of the uses to which an owner might put his real property was a phenomenon of the late teens and early twenties of the present century. The first compre-

hensive zoning ordinance in the United States was enacted in 1916 in the City of New York (Miller v. Board of Public Works, 195 Cal. 477, 485), and in the space of nine years when this court first sustained the constitutionality of the principle in the Miller case in 1925, a bulletin of the United States Department of Commerce showed that "35 states and the District of Columbia have adopted this form of regulation; 221 municipalities have been zoned and over 22,000,000 inhabitants, aggregating 40 per cent of the urban population of this country, are living in zoned territory." (Miller v. Board of Public Works, supra, p. 486.) This court further commented in Miller at page 486: "The rapidity of the growth of the sentiment in favor of comprehensive zoning, coupled with the extensive and successful application of the idea, are evidence of its present and potential value for the promotion and perpetuation, along broader and better lines, of the moral and material welfare of a people." When the Supreme Court of the United States in 1926 set its seal of approval upon the constitutionality of this then new type of legislation in Euclid v. Ambler Realty Company, 272 U.S. 365, the cycle was completed, and comprehensive zoning in the short space of ten years had taken its place as a constitutionally recognized part of our legal and political system. We indulge in this bit of legal history because, as will appear, plaintiffs place their principal reliance upon language first found in cases decided long before the principle of comprehensive zoning was anywhere applied in this country or its constitutionality established.

Those early zoning cases laid down the broad pattern of the rules by which the constitutionality of such legislation is to be tested in the courts. Thus in Euclid v. Ambler Realty Company, supra, 272 U.S. at page 387, Mr. Justice Sutherland speaking for that court, said: "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which,

before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

This principle of the elasticity of the application to be given to settled constitutional principles finds its echo in the language of this court in Miller v. Board of Public Works, supra, 195 Cal. at page 485: "Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race. In brief, 'there is nothing known to the law that keeps more in step with human progress than does the exercise of this power.'"

As a corollary to this recognized principle of the capacity of the police power to meet the reasonable current requirements of time and place and period in history is the equally well settled rule that the determination of the necessity and form of such regulations, as is true with all exercises of the police power, is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity? Thus in Miller, supra, this court said in 195 Cal. at page 490: "The courts may differ with the legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the

legislative body may have had in mind, which have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. . . . [W]hen the necessity or propriety of an enactment [is] a question upon which reasonable minds might differ, the propriety and necessity of such enactment [is] a matter of legislative determination."

So in Ambler, supra, the United States Supreme Court said (272 U.S. at p. 388): "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." This test of the validity of comprehensive zoning regulations has consistently been applied and followed by this court, so that whenever we have found that reasonable minds might differ as to the necessity or propriety of particular regulations or classifications, we have bowed to the legislative determination and sustained the regulation. (See e.g., Lockard v. City of Los Angeles, 33 Cal. 2d 453, 461; Wilkins v. City of San Bernardino, 29 Cal. 2d 332, 339; Acker v. Baldwin, 18 Cal. 2d 341, 344; Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 93-94.)

It was in clear recognition of this principle of the division of functions between the legislative and judicial branches that the trial judge in effect concluded that although his own determination, if the questions presented had been his to decide, would have been to the contrary, since under the evidence presented to the legislative body and to the court reasonable minds could differ, he must bow to the legislative conclusion. Plaintiffs do not question the correctness of this rule as a general guide to be followed in determining the constitutionality of zoning ordinances, but they make the narrower contention that where property is primarily or preponderantly valuable for the extraction therefrom of a natural resource, here the valuable sand and gravel deposits in their land, the legislative authorities may not constitutionally prohibit it altogether, although they admit that they may otherwise regulate the extraction and recovery of such natural resources. In sup-

port of this position plaintiffs primarily rely upon five California cases and one case from the Supreme Court of the United States: In re Kelso (1905), 147 Cal. 602; In re Throop (1915), 169 Cal. 93; People v. Hawley (1929), 207 Cal. 395; Wheeler v. Gregg (1949), 90 Cal. App. 2d 348; Morton v. Superior Court (1954), 124 Cal. App. 2d 577; Pennsylvania Coal Company v. Mahon (1922), 260 U.S. 393.

We must admit that there is language in these cases, which pressed to its ultimate conclusion, and divorced from the facts of each particular case in which it was used, lends color to plaintiffs' position. Typical is the statement in the earliest of them, Kelso, 147 Cal. at page 612: "It [the ordinance under attack] is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place of deposit. Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others it is lawful use which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power."

Of this case and Throop, supra, 169 Cal. 93, it is to be noted that both were decided long before the principle of comprehensive zoning had been enacted into legislation anywhere in the United States; and hence long before the precise constitutional theories upon which such legislation was later sustained had been anywhere formulated. The primary purpose of comprehensive zoning is to protect others, and the general public, from uses of property which will, if permitted, prove injurious to them. Thus in saying in Kelso: "So far as such use of one's property may be had *without injury to others* it is a lawful use which cannot be absolutely prohibited," (emphasis added) this court,

somewhat prophetically, left open the very question with which we are here concerned, because the legislative body in our case has determined that the prohibited use cannot be had without injury to others and the trial court has found that that is a question upon which reasonable minds may differ, and for that reason is concluded by the legislative determination.

People v. Hawley, supra, 207 Cal. 395, concerned three separate actions brought with respect to certain excavations being made by the Los Angeles Rock and Gravel Company. One action involved a nuisance *per se* (Code Civ. Proc., § 731) and the other two actions involved the validity of two Los Angeles zoning ordinances. All three actions were tried together for determination of the facts. In the nuisance action the trial court made findings including injunctions affirmative and injunctions negative which thereby allowed the rock and gravel company to proceed but in a proper and legal manner. As to the zoning actions, the trial court found that "to permit the company to continue its excavation operations upon [its own] lands subject to the conditions imposed upon said operations by the judgment and decree in [the nuisance case] would not result in any substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the lands of [the] company" and "[a]ny [city] ordinance which would enjoin and prohibit the company from thus using its property [was] void." (P. 413.) In so concluding this court upon citation of In re Kelso, supra, 147 Cal. 609, stated at page 412: "No authority is required to support the proposition that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the *legal rights* of others." (Emphasis added.) In this case this court *affirmed* the judgment of the trial court and, in stressing the factual basis of the decision, this court on review referred to the large amount of evidence heard by the trial court (p. 403) and such significant findings as these: That the work which the company was doing when

done properly pursuant to the conditions imposed by the judgment in the nuisance action would be a positive benefit to the adjoining property by controlling flood waters and carrying them off; that the alleged objectionable noise from the company's operations would be less than the noise made by the equipment used on certain railroads which ran along the entire length of the company's property; and that the company proposed to conduct its business and excavations "in such a way as to create no menace to public health, safety or morals." (P. 410.) This court in deciding Hawley cited Miller v. Board of Public Works, supra, 195 Cal. 477 (see 207 Cal. at p. 410) and other cases which recognized the rule that if reasonable minds may differ on the necessity of a zoning classification, the courts will not interfere. We can only conclude that in Hawley this court must have determined that on no reasonable hypothesis could the legislative determination be supported under the facts established in that case.

Wheeler v. Gregg, supra, 90 Cal. App. 2d 348, was an action by a group of neighboring property owners to nullify the city's *grant of a conditional use permit to defendant* for operation of a stone quarry on his property in a residential district. The city had imposed certain conditions on the quarry operations and the trial court imposed further operational restrictions. On appeal it was held that the quarry operations as limited by the terms of the permit and the order of the trial court would not be a nuisance. In so concluding the court said at pages 364-365: "[T]he reasonableness of the zoning as applied to certain lines of commercial zoning must be distinguished from the reasonableness of zoning regulations prohibiting the development of natural resources. The exclusion of ordinary business enterprises does not destroy any inherent property right; and, if not discriminatory, will be held reasonable and valid. Most such businesses can be conducted at any other designated place. But rock and gravel, like any other natural resource, can be obtained only in those particular areas where the deposit has been lodged by nature. Therefore, it follows that to absolutely prohibit the removal of rock, sand and gravel from one's own land in an instance

where such land is primarily valuable only by reason of the existence of rock, sand and gravel, *might be regarded* as an unreasonable exercise of the police power." (Emphasis added.) Since the court was affirming a permit *legalizing* the questioned use of the property the last quoted language was obviously dictum.

Morton v. Superior Court, supra, 124 Cal. App. 2d 577, was an action by the county and state to enjoin the operation of a rock quarry on the ground that it constituted a nuisance and that it was being operated in violation of regulatory ordinances. Although the nearest property owners apparently did not object, others complained that operation of the quarry should be enjoined as a nuisance because of the dust it created, the noise of the rock-crushing machinery, particularly during hours when such noises were most objectionable, such as evenings and Sunday mornings, and the traffic problems or hazards that resulted on a nearby public highway in consequence of the movement of trucks to and from the quarry. An injunction by the trial court prohibiting the operation of the quarry at all was held too broad, since where the business itself was lawful and not a nuisance *per se*, it could not be enjoined *in toto*, if its operations could be reformed so as to eliminate the objectionable aspects. Otherwise, in cases where land might have no other value or purpose than for quarrying, the owner in effect would be deprived of his property without due process of law. The Morton case cites and relies heavily on Wheeler v. Gregg, supra, People v. Hawley, supra, In re Kelso, supra, and In re Throop, supra (124 Cal. App. 2d at pp. 584-586) for the proposition that since a quarry is basically a lawful business and not a nuisance *per se*, but only subject to becoming so under particular circumstances, a municipality cannot outlaw such business altogether. This case, like Throop and Hawley, did not deal with a comprehensive zoning ordinance, although it did involve a use permit ordinance apparently effective in every part of the county, and the applicability and effect of which was, as noted by the court, at that very time being litigated in another action. (124 Cal. App. 2d at pp. 587-588.)

The Kelso, Throop and Hawley cases were distinguished in In re Angelus (1944), 65 Cal. App. 2d 441, wherein the petitioner was seeking a writ of habeas corpus to invalidate the local zoning ordinance which prohibited rock, sand and gravel excavating operations on his property. In upholding the validity of the ordinance as a proper exercise of the police power, the court said at pages 448-449: "The petitioner cites and relies on *In re Kelso* . . . and *In re Throop*. . . . We think neither case is pertinent because neither case involved a zoning ordinance. He also cites and relies on *People v. Hawley*. . . . That case is more nearly in point but it is to be distinguished in its facts." And at page 453: "As we stated in the beginning . . . *In re Kelso, supra*, did not involve a zoning ordinance, however *Miller v. Board of Public Works*, 195 Cal. 477 [234 P. 381, 38 A.L.R. 1479], did. Therefore in the very beginning of that case, on page 483, the court quoted the provisions of the enabling act of 1917 which authorized the enactment of zoning ordinances." The court then quoted at length from the Miller case to the effect that the police power is a developing factor so as to meet changing conditions in promoting the "health, safety, morals, or general welfare of the public" and in its exercise a "large discretion is vested in the legislative branch of the government," for it is "only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals, or general welfare that it will be nullified by the courts." (P. 454.) The court concluded this phase of its discussion at page 455: "Those passages [from the Miller case] make it clear that what was not proper practice at the time the court decided *In re Kelso*, supra, was by virtue of the enactment of the statute of 1917 a proper enactment within the purview of the police power."

The Kelso case was also noted and distinguished in West Bros. Brick Co. v. City of Alexandria (Va. 1937), 192 S.E. 881 (a leading case with reference to the validity of a local ordinance forbidding excavations of brick clay in a residential area) as follows at page 889: "Many cases are cited as showing, or tending to show, the unreasonableness of the ordinance in judgment. Among them are these:

"*Re Kelso*, 147 Cal. 609; . . . That was decided more than thirty years ago. A San Francisco ordinance prohibited the operation of a quarry in a given district. The court said that there were many ways of operating a quarry, some of which could harm no one. It recognized the fact that one operated by blasts might be prohibited and that its operations might be hedged about by valid regulations which would make it unprofitable. If that case intended to hold that the city cannot forbid the operation of quarries, operated as quarries are ordinarily operated, *where people live or are accustomed to move, then it is out of touch with latter day extensions of police power.*" (Emphasis added.)

The Pennsylvania Coal Company case, supra, 260 U. S. 393, held unconstitutional a statute prohibiting the mining of coal under private dwellings and streets or cities, where the right to conduct such mining operations had been reserved in transferring the surface. It was decided before the principles of comprehensive zoning were established, and differs from our case additionally in that the mining was to be done underground and the persons to be benefited by the legislation were grantees as to whom the right to mine had been expressly reserved. Judge Wilbur said in an opinion sustaining a Los Angeles comprehensive zoning ordinance prohibiting the extraction of oil from lands in a residential zone (Marblehead Land Co. v. City of Los Angeles, 47 F. 2d 528, 532), referring to the Pennsylvania Coal Company case: "The state Legislature prohibited mining in such fashion as would interfere with the structures erected by the grantees upon the surface, thus in effect giving to the grantees a security in the enjoyment of the surface which they had not bargained for or paid for, and depriving a grantor of the right it had reserved in its deed to the grantee. It was held that this was so unreasonable . . . that it was violative of the constitutional rights guaranteed to the Pennsylvania Coal Company. . . . While this decision deals with the right of an owner to develop its inherent potentialities by producing therefrom its mineral wealth, there does not seem to be any distinction in principle between depriving an owner of the right to develop such inherent qualities of the land and a regulation

which prohibits an owner from erecting upon his land structures which he believes will, and which in fact will, enhance the value of his property." (See also West Bros. Brick Co. v. City of Alexandria, supra, 192 S. E. 881, 889, and Town of Burlington v. Dunn, 61 N. E. 2d 243, 246, where the courts also distinguish Pennsylvania Coal Co. and hold it inapplicable to comprehensive zoning.)

Too many cases have been decided upholding the constitutionality of comprehensive zoning ordinances prohibiting the removal of natural products from lands in certain zones for us now to accept at full value the suggestion that there is such an inherent difference in natural products of the property that in a case where reasonable minds may differ as to the necessity of such prohibition the same power to prohibit the extraction of natural products does not inhere in the legislative body as it has to prohibit uses of other sorts. (Friel v. County of Los Angeles, 172 Cal. App. 2d 142 [oil and gas]; In re Angelus, supra, 65 Cal. App. 2d 441 [sand and gravel]; Marblehead Land Co. v. City of Los Angeles, supra, 47 F. 2d 528, cert. den. 284 U. S. 634 [oil and gas]; West Bros. Brick Co. v. City of Alexandria, supra, 192 S.E. 881, app. dis. 302 U. S. 658 [brick clay]; County Commissioners of Howard County v. Merryman, 159 A. 2d 854 [sand and gravel]; Township of Bloomfield v. Beardslee, 84 N.W. 2d 537 [gravel]; Moore v. Memphis Stone & Gravel Company, 339 S.W. 2d 29 [gravel]; Raimondo v. Board of Appeals of Bedford, 118 N.E. 2d 67 [sand and gravel]; Town of Seekonk v. John J. McHale & Sons, 90 N.E. 2d 325 [gravel]; Fred v. Mayor and Council of Borough of Old Tappan, 92 A. 2d 473 [topsoil]; Town of Burlington v. Dunn, supra, 61 N.E. 2d 243, cert. den. 326 U. S. 739 [topsoil]; Miesz v. Village of Mayfield Heights, 111 N.E. 2d 20 [topsoil]; People v. Gerus, 69 N.Y.S. 2d 283 [sand and gravel]; Krantz v. Town of Amherst, 80 N.Y.S. 2d 812 [topsoil]; K. & L. Oil Co. v. Oklahoma City, 14 F. Supp. 492 [oil]; and see Beverly Oil Co. v. Los Angeles, 40 Cal. 2d 552; Pacific Palisades Assn. v. City of Huntington Beach, 196 Cal. 211.)

Plaintiffs rely heavily upon the finding of the trial court "that the subject property has no appreciable economic

value for any of the uses permitted in the A1, A2 or RA zones, or for any other use except for the purpose of excavating, crushing and processing rock, sand and gravel and activities related or incidental thereto, and if such use is prohibited, it will destroy the economic value thereof." There was testimony before the legislative body that the property could be successfully devoted to certain other uses, i.e., for stabling horses, cattle feeding and grazing, chicken raising, dog kennels, fish hatcheries, golf courses, certain types of horticulture, and recreation. It must be conceded that in relation to its value for the extraction of rock, sand and gravel the value of the property for any of the described uses is relatively small if not minimal, and that as to a considerable part of it seasonal flooding might prevent its continuous use for any purpose. "However, the very essence of the police power as differentiated from the power of eminent domain is that the deprivation of individual rights and property cannot prevent its operation, once it is shown that its exercise is proper and that the method of its exercise is reasonably within the meaning of due process of law. . . . And it is recognized that oil production is a business which must operate, if at all, where the resources are found. Nevertheless city zoning ordinances prohibiting the production of oil in designated areas have been held valid." (Beverly Oil Co. v. City of Los Angeles, supra, 40 Cal. 2d 552, 557-558.)

In Beverly at page 557 this court quoted from Hadacheck v. Sebastian, 239 U. S. 394, 410: "It is to be remembered that we are dealing with one of the most essential powers of the government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. [Citation.] To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in its march private interests are in the way they must yield to the good of the community."

More than one court has pointed out, as was done by Judge Wilbur, in the passage quoted above from the Marblehead Land Co. case, 47 F. 2d at page 532, that "there does not seem to be any distinction in principle between depriving an owner of the right to develop such inherent qualities of the land and a regulation which prohibits an owner from erecting on his land structures which he believes will, and which in fact will, enhance the value of the property."

In Town of Seekonk v. John J. McHale & Sons, supra, 90 N.E. 2d at page 327, the Supreme Judicial Court of Massachusetts put it this way: "The appealing defendant further contends that the zoning by-law is unconstitutional if it prevents the owner from removing a natural product from his land. But all zoning restricts an owner in the uses he could otherwise make of his property. There seems to us to be no difference in principle whether the restriction takes the form of preventing the owner from building a factory or from establishing a gravel business."

The Supreme Court of Michigan in Township of Bloomfield v. Beardslee, supra, 84 N.W. 2d at page 540, said: "It is urged to us that the ordinance prohibits the removal of a natural resource. This, the owner insists is invalid. 'There exists,' we are told, 'a legal right to exploit natural resources where they may be found' . . . that the 'extraction of natural resources . . . must be undertaken at that spot or not at all.'

"Attractive though the argument may seem upon its first reading, it must be obvious that a logical application of its principle would be destructive of all zoning. For in each case the particular parcel has, it is always asserted, some peculiar utility: it is an ideal spot for a motel, or a factory, or a junk yard, or what not. It has that contiguity to traffic, that peculiar topographical structure, that supply of water or shade, which makes it unique. Yet, just as the surface user desired by the owner must give way, at times, to the public good, so must the sub-surface exploitation."

Finally on this point we quote from the West Bros. Brick Co. case, supra, 192 S.E. at page 890: "The enact-

ment of zoning ordinances and cases which test them are all within the recollection of most of us. General rules applicable thereto are now well settled. They must not be wholly unreasonable, but they are presumed to be valid and to have been promulgated by those familiar with local conditions. Vested interests will not defeat them, and of course constitutional rights are not to be measured in terms of money. That, however, is a consideration to be remembered. Great financial losses should not be inflicted where benefits to others are negligible, but public welfare and public convenience do control and are in themselves terms constantly adjusted to meet new conditions. Upon those who would set aside such ordinances rests a heavy burden of proof. They stand when their validity is debatable."

It is our conclusion that, having found on substantial evidence that the necessity and propriety of the legislative action in this case is one upon which reasonable minds may differ, the trial court properly found in favor of the ordinance's constitutionality.

Plaintiffs also contend that the challenged zoning law discriminates against their property in that Livingston Rock and Gravel Company conducts operations on some 125 acres contiguous to plaintiffs' property. The Livingston property adjoins plaintiffs' property west of Foothill Boulevard. About half of plaintiffs' property lies east of Foothill Boulevard and it has developed differently from the property west of the boulevard. The original permit for the Livingston rock and gravel operations was issued in 1931; the property having been worked some thirty years, is substantially depleted and its number of remaining years of economic operation is doubtful. The Livingston property, 125 acres, is considerably smaller than plaintiffs' property, 348 acres; it is not in the center of Tujunga Wash but in a side pocket formed by the hills; and according to expert evidence, its dust was less subject to being stirred and carried by the winds in the Tujunga Wash. As heretofore stated, the trial judge pursuant to stipulation of counsel made an extensive tour of inspection of plaintiffs' property and the surrounding area, which observa-

tions became evidence in the case in support of the findings. (Wheeler v. Gregg, supra, 90 Cal. App. 2d 348, 366-367; see also Friel v. County of Los Angeles, supra, 172 Cal. App. 2d 142, 148.) Appropriate here for consideration is the extensive memorandum opinion filed by the trial judge and included in the record (Rules on Appeal, Rule 5(a), 50 Cal. 2d 1, 5; see also Clemons v. City of Los Angeles, 36 Cal. 2d 95, 100), wherein the comment is made that upon "viewing the Livingston parcel and the subject property, each in its entirety, reasonable minds can differ on the question of whether authority granted to operate one for the extraction of rock, sand and gravel and to deny the same operation to the other is arbitrary and discriminatory." In concluding that it could not "find a discriminatory application" of the zoning law to plaintiffs' property, the trial court noted that there were "substantial differences in the terrain and degree of development of the land south of and adjacent to the subject property east of Foothill Boulevard than west thereof. Viewing as we must 'the character of the property of the objecting parties, the nature of the surrounding terrain, the use to which each has been put, recent trends of development (*Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 462), we cannot fail to observe but that the differences between the plaintiffs' entire parcel and the Livingston property are 'fairly debatable' (*Lockard v. City of Los Angeles, supra*, p. 462) and when comparability is debatable we may not substitute our judgment for that of the legislative body." As was stated in Miller v. Board of Public Works, supra, 195 Cal. 477, at page 495: "Somewhere the line of demarcation must be drawn, and it is primarily the province of the municipal body to which the zoning function is committed to draw that line of demarcation, and it is neither the province nor the duty of courts to interfere with the discretion with which such bodies are invested in the absence of a clear showing of an abuse of that discretion."

We are satisfied that the zoning law is consistent with the obvious legislative policy in municipal planning and development of this area in furtherance of the best interests and general welfare of the community as a whole: To

confine rock and gravel operations in the Tujunga Wash to the area *downstream* from the Hansen Dam, and to encourage and protect the welfare and growth of the residential communities of Sunland and Tujunga by preventing the extension of rock and gravel operations upstream from the dam, meanwhile letting the already existing but substantially depleted Livingston operation gradually work itself into oblivion. (See Paramount Rock Co. v. County of San Diego, 180 Cal. App. 2d 217, 228-230.)

As an alternative ground for relief, plaintiffs sought a declaration of their right to conduct rock, sand and gravel operations on their property as a conditional use because of certain provisions of successive zoning ordinances. While superficially it might appear that plaintiffs' theories of relief are mutually exclusive and inconsistent—on the one hand applying for a variance from the zoning law which necessarily conceeds the existence of a restriction of use and on the other hand, seeking a declaration that no restriction exists so that the desired use is not subject to injunction—plaintiffs' concessions on their variance application cannot legally effect a waiver of any existing status rights of their property by reason of alleged exceptions or conditional use permits under successive zoning ordinances. (See Rubin v. Board of Directors, 16 Cal. 2d 119, 126.) The trial court found that plaintiffs' property did "not have a conditional use, non-conforming use, or other status permitting it, under the ordinances of the City of Los Angeles, to excavate from and process upon the subject property, rock, sand and gravel."

From the record it appears that until about 1935 plaintiffs' property was in a residential district but rock, sand and gravel operations were being conducted thereon as a non-conforming use. In 1935 these operations were voluntarily terminated and the site where the operations were located was taken in 1939 as part of the Hansen Dam condemnation proceedings. Concededly, there have been no active rock and gravel operations on plaintiffs' property since 1939.

In 1934 Ordinance No. 74,140 was enacted whereby plaintiffs' property was established as within a residential district subject only to a variance in use "for the particular purpose for which the original exception was granted as shown by the records." (§ 4(d).) There was no evidence that any "original exception" was ever specifically granted to permit rock, sand and gravel operations on plaintiffs' property, so the exception provision of the ordinance was inoperative to exclude plaintiffs' property from the residential restriction use. However, the same ordinance provided for continuance of non-conforming use but expressly declared that such use should be deemed discontinued and abandoned "when such use has ceased to operate or the lot or premises has ceased to be used for such non-conforming purpose for a period of sixty (60) days." Therefore, conceding the existence of a non-conforming use status at the time of the 1934 ordinance, the complete cessation of such use on the subject property in 1935 or, even if that be the fact, in 1939 terminated any non-conforming use status; and since then to the present date plaintiffs have not attempted to conduct the desired operations on their property. Ordinance No. 77,000 adopted in 1936 and establishing the Los Angeles Municipal Code contained substantially the same provisions as Ordinance No. 74,140 as here pertinent. (§§ 16.01-16.05.)

Plaintiffs further cite these additional ordinances: (1) Ordinance No. 90,500, adopted in 1946, setting forth the "Comprehensive Zoning Plan of the City of Los Angeles" and providing that certain uses, including the development of natural resources other than drilling for oil, "existing at the time this Section becomes effective" shall be deemed to have been approved for conditional use (§ 12.24 B9); and (2) Ordinance No. 92,679, enacted in 1948 and setting up rock and gravel districts, with permission thereby provided for continuance of any conditional use permit or any other right *already existing* for the development of rock and gravel (§ 13.03 B2). However, since the use of plaintiffs' property for rock, sand and gravel operations had already terminated some ten years previously, the 1946 and 1948 ordinances can add no force to plaintiffs' arguments

here. The adoption of a comprehensive plan of community development looking toward the containment and eventual elimination of non-conforming uses, including rock and gravel operations, accords with recognized zoning objectives under settled legal principles. (Paramount Rock Co. v. County of San Diego, supra, 180 Cal. App. 2d 217, 228-230.)

The judgment is affirmed.

DOOLING, J.

We concur:

GIBSON, C. J.
TRAYNOR, J.
PETERS, J.
WHITE, J.

CONSOLIDATED ROCK PRODUCTS CO. v. CITY OF LOS ANGELES

L.A. 26566

DISSENTING OPINION

I dissent. I would reverse the judgment for the reasons expressed by Mr. Presiding Justice Fox in the opinion prepared by him for the District Court of Appeal in Consolidated Rock Products Co. v. City of Los Angeles, 195 A.C.A. 114, 15 Cal. Rptr. 775.

McCOMB, J.

I Concur:
SCHAUER, J.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CONSOLIDATED ROCK PRODUCTS COMPANY, a corporation, and VALLEY REAL ESTATE COMPANY, a corporation,
Plaintiffs and Appellants,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Defendant and Respondent.

Civ. No. 25419

Filed Aug. 22, 1961

APPEAL from judgment of the Superior Court of Los Angeles County. Philip H. Richards, Judge. Reversed with directions.

Having exhausted their administrative remedies, plaintiffs brought this action to have declared unconstitutional the zoning law of the city of Los Angeles insofar as it applies to prevent rock and gravel operations on their land; to have enforcement enjoined; and alternatively for a declaration that the zoning law does not in fact prohibit the desired use. From a judgment in favor of defendant, plaintiffs appeal.

The land in question is owned by plaintiff Valley Real Estate Company and held by plaintiff Consolidated Rock Products Company under a lease dated March 1, 1956. The lease term extends to February 29, 1976, with an option for an additional ten years. The property consists of 348 acres, situated in the watercourse known as the Tujunga Wash, and lying northeasterly (upstream) of Hansen Dam

in the San Fernando Valley.[1] It is a little more than two miles long with an average width of roughly one-quarter mile. The length of the property lies in a general east-west fashion, and is divided approximately in the center by Foothill Boulevard, a north-south thorough-fare at that point. The property forms substantially the apex of the Tujunga Cone, the second largest alluvial cone of rock, sand and gravel in Los Angeles County. The Tujunga Wash from the eastern to the western termini of the property in question is bordered on the north by the base of the mountains and on the south by bluffs of low hills except for relatively narrow plateaus on either side above the level of the wash. The property is composed of rock, sand and gravel to a depth of about forty feet. It is isolated from land presently being used for other purposes and is situated in a natural ampitheater surrounded by the rugged terrain of the Angeles National Forest on the north, by Tujunga Canyon on the east, by Hansen Dam and its debris basin on the west and by high hills and cliffs on the south. This property and the surrounding area has remained in its present undeveloped state for over 30 years. Within the 300 foot area surrounding the five-mile perimeter of plaintiffs' property there are located fewer than 34 dwelling houses. The communities of Sunland and Tujunga adjoining the property are residential communities, the more greatly developed portions of which lie easterly and southeasterly of plaintiffs' property. In recent years the trend of development of these communities has been in a westerly direction toward the property and along and upon the bluffs north and south thereof.

The 348 acres in question are zoned for agricultural and residential use, and rock, sand and gravel operations are prohibited.

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[1] The property which is the subject of this litigation is only a part of the original leasehold, the rest of it being situated southerly of Hansen Dam, with Consolidated Roscoe plant being presently supplied by materials originating from the portion of the lease not here involved.

The trial court found that the subject property has great value if used for rock, sand and gravel excavation, but no economic value for any other purpose, and that to contend that it has any economic value for any other use, including those uses for which it was zoned, is preposterous.[2] With respect to the effect that rock and gravel operations would

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[2] More specifically, the court found that the property is "adjacent to the channel through which the waters of the Tujunga Wash flow, and . . . is subject to overflow of water and flooding periodically during periods of heavy rainfall; . . . during periods of heavy floods hundreds of thousands of tons of boulders, rock and other debris have been periodically washed and deposited upon said land by such flood waters." Hansen Dam does not provide protection "against floods and rain water runoff for the land lying above the Dam, including the subject property, which is now . . . has been and will continue to be subject to flood hazards. . . . (N)one of plaintiffs' subject land has any economic value for any use or purpose other than the excavation of rock, sand and gravel and the operation of a rock crushing and processing plant in conjunction therewith, and . . . if such use . . . be prohibited, such will destroy the economic value thereof. * * * Other than by the expenditure of prohibitive amounts of money in the building of a flood control channel, the subject property serves and can only serve the purpose as a detritus spreading ground and retarding basin for flood water emerging from the Tujunga Canyon before they reach Hansen Dam. Physically it is possible, of course, to erect a structure on the surface of this deposit but the court finds that due to the continuing flood hazard and the nature of the soil to contend that the subject property has any economic value for agricultural, residential, business, commercial or industrial use other than the extraction of rock, sand and gravel is preposterous and that the subject property has a large value for the excavation of rock, sand and gravel. . . ."

It was also found that the use of plaintiffs' property for the production of rock, sand and gravel is in the interest of the public welfare, in that there is only about 11 years' supply remaining in established Rock and Gravel Districts in the San Fernando Valley, and unless new Districts are established, it will be necessary to import the materials from more distant points at an increased cost to the consumers and public of the City of Los Angeles.

have on the nearby communities, the trial court found that dust and noise factors could be controlled to the point where they would be "minimal,"[3] that there would be no extraordinary danger to children, and in fact that plaintiffs' "business of excavating, (etc.) *can be conducted on plaintiffs' said property with compatibility to adjacent properties* and with minimal detriment to the living amenities or health conditions of the inhabitants of adjacent properties or in the general area and without probable depreciation in property values to the adjacent properties."

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[3] The findings read: "(A)s to the public health of the community adjacent to the subject property, there is no question but that the Sunland-Tujunga area has a reputation as a haven for sufferers from respiratory symptoms and that the possible advent of a rock, sand and gravel operation near such residential area has caused considerable apprehension of air pollution. Unabated by water, rock and gravel extraction, crushing, screening, stock piling, loading and transporting would undoubtedly cause considerable dust. The court is of the opinion that properly controlled by water, as it is within the power of the legislative body to compel, it appears that the creation of dust for air-borne convection is and can be reduced to a point of pollution below an acceptable standard. Moreover, it was established to the court's satisfaction that any such dust as would not be so eliminated would in any event be inorganic and not organic dust, the latter which primarily induces respiratory ailments. The court therefore concludes that the preservation of health in the Sunland-Tujunga area is a minimal basis for justifying a denial of the present application.

"It is true that certain noise from the proposed operation is inevitable but appears to be minimal. Increased trucking is likely but the points at which it would make the greatest impact on the surrounding areas would depend in large measure on the manner of handling the extraction operation. Danger to children, no matter how carefully the property is fenced, is, of course, possible but probably no more so than many other places and types of structure which inevitably attract venturesome youths. Esthetically, it is undoubtedly true that an alluvial wash in its natural state is superior to pits therein. . . ."

It was also found that the Sunland-Tujunga area has a national reputation as a haven for sufferers from respiratory ailments and is inhabited by many such sufferers and that a considerable portion of its economy is based upon such reputation; that the possible advent of a substantial rock, sand and gravel extraction and processing operation upon the subject property has caused considerable apprehension to the residents of the communities of Sunland and Tujunga of air pollution, traffic and other dangers and annoyances as a result thereof; and that rock and gravel operations upon the subject property could adversely affect the reputation of the Sunland-Tujunga area as a haven for sufferers from respiratory ailments.

The question before us is whether the zoning law, insofar as it prohibits rock, sand and gravel operations on plaintiffs' property, is a valid exercise of the police power. The validity of zoning ordinances generally, insofar as they set forth a plan of community development whereby certain uses are prohibited from segments of the community, is established beyond question. The constitutional question arises only with respect to particular application. Zoning laws are considered by the courts with every intendment in favor of their validity. Although the courts may differ with the legislative body as to the propriety or necessity of a particular enactment, they will not substitute their judgment for that of the municipal legislature, and the mere fact that hardship is suffered is not material, for an exercise of the police power will always affect someone adversely. It must be shown that there has been an unreasonable, oppressive, or unwarranted interference with property rights. (*Clemons v. City of Los Angeles*, 36 Cal. 2d 95, 98-99; *Lockard v. City of Los Angeles*, 33 Cal. 2d 453; *Paramount Rock Co. v. County of San Diego*, 180 Cal. App. 2d 217; *Miller v. Board of Public Works*, 195 Cal. 477.) These are the rules expressed in the myriad of cases in which property was zoned according to a "master plan" which was set up for the general welfare of the community. In many cases extremely fine judgments must be made, and a judicial reluctance to interfere with legislative determinations which are "fairly debatable" or on which "reasonable

minds may differ" (*Miller v. Board of Public Works, supra*) is both understandable and wise.

The trial court, after stating its own conclusions with respect to noise, dust, danger, and esthetic considerations, found, "*It is true that reasonable minds might differ and have differed upon the foregoing.*"[4] It also found that although the value of the property, both to plaintiffs and to the community, for the production of rock, sand and gravel is undebatable, reasonable minds might differ as to the necessity therefor. It is apparent that the trial court's judgment was based on the following reasoning: In determining the validity of zoning ordinances a court will not interfere with the legislative determination, even though it may disagree with the propriety of that determination, so long as reasonable minds may differ as to its propriety (and so long as it is not discriminatory); in the case at bar it is the court's opinion that rock and gravel operations on plaintiffs' property can be conducted in a manner which is compatible with the adjacent communities, but reasonable minds may differ on that question; since reasonable minds may differ, the court cannot upset the legislative enactment. That this approach is not correct when applied to the facts of the instant case will be clearly demonstrated when we review the cases which have dealt with this problem.

In re Kelso, 147 Cal. 609, was among the first of the controversies of this nature to arise in this state. San Francisco had enacted an ordinance which prohibited the operation of a rock or stone quarry within the City and County of San Francisco. In holding the ordinance to be invalid, the opinion stated, at pages 611-613: "The effect of the ordinance . . . is to absolutely deprive the owners of real property within such limits of a valuable right incident to their ownership. . . . * * * A limitation of the use *pro tanto* deprives him of the enjoyment thereof, and any arbitrary action in this regard is a taking of private property with-

[4] The Planning Commission approved plaintiffs' application requesting that the property be designated a rock and gravel district. The City Council ultimately denied the application.

out due process of law. While in the exercise of its police power the state may limit or regulate the use, any such limitation or regulation must find its justification in the necessity for the protection of the legal rights of others. If it does not, it is an unwarrantable invasion of property rights, against which the courts will protect. * * * Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It . . . is an absolute prohibition. . . . Such a prohibition might be justified, if the removal could not be effected without improperly invading the rights of others, but it cannot be doubted that rock and stone may under some circumstances be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize." (See also *People v. Hawley*, 207 Cal. 395, 413.) The opinion goes on to say: "It may freely be conceded that rock or stone quarrying may be done in such a way and under such circumstances as to occasion injury to others or to make it a public nuisance, and that the state has the power to impose such limitations as are necessary to prevent this. * * * We can see no valid objection to the work of removing from one's own land valuable deposits of rock or stone that may not be entirely met by regulations as to the manner in which such work shall be done, and this being so, we are satisfied that an absolute prohibition of such removal under all circumstances cannot be upheld."

In *Matter of Application of Throop*, 169 Cal. 93, a South Pasadena ordinance had divided the city into commercial, residential and industrial districts. The operation of a stone crusher was prohibited in the residential district. The description of the land on which the crusher was located is very similar to that in the instant case. The area was sparsely settled and almost completely undeveloped. There were only four dwellings within 200 yards of the crusher. It was held that the ordinance was unreasonable and void in its application. Quoting from *Dobbins v. Los Angeles*, 195 U. S. 223, the opinion stated: " '(I)t is now thoroughly well settled by decisions of this court that municipal by-

laws and ordinances, and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business, to make contracts, or to use and enjoy property'." (169 Cal. 93, 99. See also *People v. Hawley*, supra, p. 411.)

People v. Hawley, supra, involved an action to enjoin the enforcement of Los Angeles city ordinances which prohibited the excavation of rock, sand and gravel on certain lands in and near the Arroyo Seco. One ordinance merely prohibited operations and the other purported to be a zoning ordinance which limited the use of the land for residential purposes, and also expressly prohibited extraction of these materials. As in the case at bar, it was found that the lands were chiefly valuable for the deposit of rock, sand and gravel contained therein. It was also found that contiguous property was built up with homes, dwellings and other buildings, but that the company proposed to conduct the business and excavations in such a way as to create no menace to public health, safety or morals. Furthermore, the trial court found "that to permit the company to continue its excavation operations upon said lands subject to the conditions imposed upon said operations . . . would not result in any substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the lands of said company." The trial court's judgment that the ordinances were "unreasonable, oppressive, unconstitutional and void" in their application to the plaintiff and its property was affirmed. At page 412 of the opinion, it was stated that: "No authority is required to support the proposition that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the legal rights of others."

The case of *Wheeler v. Gregg*, 90 Cal. App. 2d 348, involved an action by a group of citizens to nullify the granting of a conditional use permit to defendant for the operation of a rock, sand and gravel business in a residential district. The court held for defendant. Although the facts of the case are easily distinguished from those of the instant case, certain language of the opinion is quite pertinent. At pages 364-365 it was stated: "(T)he reasonableness of the zoning as applied to certain lines of commercial zoning must be distinguished from the reasonableness of zoning regulations prohibiting the development of natural resources. The exclusion of ordinary business enterprises does not destroy an inherent property right, and if not discriminatory, will be held reasonable and valid. *Most such businesses can be conducted at any other designated place. But rock and gravel, like any other natural resource, can be obtained only in those particular areas where the deposit has been lodged by nature.* Therefore, it follows that to absolutely prohibit the removal of rock, sand and gravel from one's own land in an instance where such land is primarily valuable only by reason of the existence of rock, sand and gravel, might be regarded as an unreasonable exercise of the police power (*Trans-Ocean Oil Corp. v. City of Santa Barbara*, 85 Cal. App. 2d 776, 789.)" (Emphasis added.)

The more recent case of *Morton v. Superior Court*, 124 Cal. App. 2d 577, dealt with an action by the county and state to enjoin the operation of a rock quarry on the ground that it constituted a nuisance and that it was being operated in violation of regulatory ordinances. Again the area in question was similar in description to that in the case at bar. Householders objected to the dust, noise and traffic hazard created. The trial court enjoined the operation and the quarry owner appealed. Although the evidence supported the allegations of public and private nuisance, *the judgment was reversed on the ground that there was no evidence that the conditions complained of could not be regulated so as to prevent them from constituting a nuisance.* It was stated: "The operation of a quarry is, of course, a lawful business. It is not a nuisance *per se*. Of

course, if in fact it is being operated so as to constitute a nuisance, the acts constituting the nuisance may and should be enjoined. It is even possible, where the facts justify it, that is, *where the evidence shows that the business cannot be operated at all without creating a nuisance*, to prohibit the operation completely. This same result may be reached by a proper and reasonable zoning ordinance. But that is not this case. Here the trial court made no finding that the conditions creating the nuisance could not be rectified. * * * There is a vast difference between regulating the methods of operation of a lawful business by injunction or ordinance, and in completely prohibiting the carrying on of such business. Quarry property is generally a one-use property. The rock must be quarried at the site where it exists or not at all. An absolute prohibition, therefore, practically amounts to a taking of the property since it denies the owner the right to engage in the only business for which the land is fitted. While, under the police power, such complete prohibition . . . can be decreed, *it can only be justified where irreparable injury to others necessarily results and the condition cannot be rectified except by complete prohibition.* An injunction against operating property for the only lawful purpose for which it is fitted is an unusual and heroic remedy. It should only be employed where no other means of protecting the complaining public exists. Whether the attempt to regulate be by ordinance or by injunction the approach must be reasonable.

"The law is well settled to the effect that, when the defendant's business is not a nuisance *per se*, the injunction should be limited in scope . . . if a less measure of restraint will afford the relief to which plaintiff is entitled. * * * This rule of law has been applied in this state to attempts to prohibit absolutely the operation of quarries, *and this is so whether such absolute prohibition is attempted by ordinance or by injunction.*" (124 Cal. App. 2d at 581-584.) (Emphasis added.)

These principles have been applied to cases involving other natural resources in this state (*Pacific P. Assn.* v. *Huntington Beach*, 196 Cal. 211—oil; *In re Smith*, 143 Cal.

368—gasworks; *Monterey Oil Co. v. City Court*, 120 Cal. App. 2d 31); to rock and gravel operations in the federal courts (*Village of Terrace Park v. Errett*, 12 F. 2d 240; *Pacific States S. Co. v. City and County of San Francisco*, 171 F. 727 (N.D. Cal.). In both of these cases zoning ordinances were held invalid insofar as they completely prohibited operations); and to rock and gravel operations in other jurisdictions (Annotation, 47 A.L.R. 2d 490, 510, and cases cited therein).

The foregoing cases have established beyond question the proposition that when property has little or no value for any use except the extraction of rock and gravel (or other natural resources), operations may not be completely prohibited unless it is impossible to conduct them without creating a nuisance. The judgment in the *Morton* case, *supra*, granting an injunction, was reversed even though it was found that the operations were being conducted so as to constitute a nuisance, *for the reason that it was not found that the business could not be conducted without constituting a nuisance.* Far from so finding in the instant case, the court below found that rock, sand and gravel operations *could* be conducted in a manner compatible with the adjacent communities.

The finding below, that reasonable minds may differ on the question whether noise and dust factors could be kept to a "minimal" level, and "below an acceptable standard," amount to nothing more than a determination that reasonable minds may differ as to whether operations must necessarily constitute a nuisance. Since it must be found, in order to uphold the prohibition, that operations cannot be conducted without creating a nuisance, and the trial court found the contrary to be the fact, it is clear that it is not relevant what the opinion of others might be. The mere use of a zoning ordinance to prohibit operations does not confer upon the City powers which it otherwise does not have. The doctrine of judicial abstention applicable to the testing of zoning laws is founded upon the twofold assumption that (1) zoning demarcations separate properties which can be used for a number of purposes, and (2)

any business which may be precluded from a certain location can be conducted elsewhere. Neither assumption applies here.

The cases relied upon by defendant are not in point. The one factually closest to the case at bar is *Paramount Rock Co.* v. *County of San Diego*, 180 Cal. App. 2d 217. Petitioner's land was zoned for agricultural purposes. The operation of rock quarries, sand and gravel pits, rock crushing and cement pre-mixing plants were prohibited. However, petitioner was allowed to operate a sand pit (there was no rock and gravel at the site) and a cement pre-mixing plant as an existing, non-conforming use. The dispute arose when petitioner sought to operate a rock crushing plant also. The court held against petitioner. Its primary determination was that the rock crusher was an improper extension of the non-conforming use. In holding that the restriction was not unconstitutional, the court took into consideration the following: (1) The land was being used for the purpose for which it was primarily suited; (2) there was no finding that the land was not suitable for agricultural purposes; and (3) other established ready-mix concrete businesses in the area obtained their materials elsewhere, and did not operate rock crushers on their respective sites. The distinction between that case and this needs no further elaboration.

The rest of the cases on which defendant places its principal reliance are typical of those involving a general plan in which a property owner seeks to have his property removed from its classification because it would be more valuable in another. (*Lockard* v. *City of Los Angeles*, 33 Cal. 2d 453; *Clemons* v. *City of Los Angeles*, 36 Cal. 2d 95 *Wilkins* v. *City of San Bernardino*, 29 Cal. 2d 332; *Miller* v. *Board of Public Works*, 195 Cal. 477.) In all of those cases the property in question was well suited for the purpose for which it was zoned, and the businesses prohibited could be conducted elsewhere. The *Lockard* case distinguished the *Hawley*, *Pacific Palisades*, and *Smith* cases, *supra*, as relating to the prohibition of the recovery of natural resources. It was stated that "considerations

which result in putting a business out of existence are different from those which justify regulations that do not prevent the operation of a business but merely restrict its location." (33 Cal. 2d at 467-468.)

The argument that the instant dispute involves an ordinary zoning law, establishing a general plan within the sphere of legislative judgment, is a red herring. When closely examined it, like the macabre raiment enveloping Poe's ghost, is found to be "untenanted by any tangible form."[5] The judgment to be made herein is not where the dividing line between various zones, each suited for the purpose for which it is zoned, should be laid. Rather it is whether plaintiffs have suffered an interference with their property rights which is wholly inconsonant with the public interest sought to be served. This has been peculiarly a judicial determination ever since *Marbury* v. *Madison*, 1 Cranch 137.

Viewed in this light, the prohibition herein is patently unconstitutional. Plaintiffs have been deprived of substantially all the value of their property, and the City has not demonstrated that this deprivation was necessary for the welfare of the community. While it is no doubt true that the Sunland-Tujunga residents are apprehensive concerning plaintiffs' proposed operations, their apprehensions do not form a legal basis for prohibiting those operations. If it is found that plaintiffs cannot in fact conduct their business without creating a nuisance, the appropriate legal action may be commenced.

Because of the view we take of this controversy, it is not necessary to consider plaintiffs' remaining arguments.

The judgment is reversed, and the trial court is directed to render a judgment not inconsistent with the views expressed herein.

Fox, *P.J.*

We concur:

Ashburn, *J.*
Herndon, *J.*

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[5] The Masque of the Red Death, Edgar Allan Poe.

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF LOS ANGELES

CONSOLIDATED ROCK PRODUCTS COMPANY, ET AL., *Plaintiffs*,

vs.

CITY OF LOS ANGELES, ET AL., *Defendants*.

No. 714,884

Filed July 25, 1960

Memorandum Decision

The Court regrets the delay in reaching and filing a decision in this case which has been attributable to the pressure of work resulting from an unexpected pro tempore assignment to the District Court of Appeal immediately following the conclusion of the trial herein which was anticipated to extend not over a month or two but has been substantially extended.

Rather than attempt an exhaustive written review of the evidence consisting of the numerous and voluminous reports, maps, charts, et cetera, the testimony of fifteen witnesses testifying on behalf of the plaintiffs and the twenty-five witnesses testifying on behalf of the defendant, the Court will herein indicate the findings to be made with reference to the allegations of the complaint as established by the pretrial stipulation of facts and the preponderance of the evidence herein. Additional observations will be made with reference to the evidence on certain issues of fact.

FIRST CAUSE OF ACTION

I

The following numbered entire paragraphs of the First Cause of Action of plaintiff's complaint are either expressly admitted or admitted by failure to deny and will be found as true: Paragraphs I, XII, XIV, XV (as amplified by Paragraph 18 of the pretrial stipulation of facts), XX (as amplified by Paragraph 19 of said stipulation), XXI (as

amplified by Paragraph 20 of said stipulation), XXII and XXVII. In addition to the allegations of Paragraph XX the Court will further find as true the affirmative allegation in defendant's answer that the Examiner of the Planning Commission recommended that plaintiffs' application be denied.

II

The allegations set forth in the following numbered paragraphs of the First Cause of Action and denied in whole or in part by defendant's answer will be found to be true to the extent hereinafter set forth and as amplified by the pretrial stipulation of facts:

1. Paragraph II as amplified by Paragraphs 3, 4 and 5 of the pretrial stipulation,

2. Paragraph III as amplified by Paragraphs 5, 6, 7, 8 and 9 of said stipulation,

3. Paragraph IV,

4. Paragraph V as amplified by Paragraph 10 of the stipulation,

5. (Paragraph VI will be later discussed);

6. Paragraphs VII and VIII as amplified by Paragraph 2 of the pretrial stipulation,

7. Paragraph IX (p. 7 l. 22 to p. 8 l. 4) together with the quoted matter contained in Paragraph VII of defendant's answer as to the provisions of Section 4, subdivision (d) of Ordinance No. 74140 and omitting the conclusions contained in Paragraph IX of the complaint (p. 8 l. 4 to p. 8 l. 6),

8. Paragraph X, except the conclusions therein (p. 8, l. 25 to p. 8 l. 28),

9. Paragraph XI, omitting therefrom the words "arbitrarily, capriciously and unreasonably" (p. 9 l. 6) and adding thereto Paragraph 11 of the pretrial stipulation,

10. (Paragraph XIII will be later discussed),

11. Paragraph XVI; omitting therefrom the portion beginning with the words "and that the Ordinances" (p. 13 l. 26) to the end of said paragraph and adding thereto Paragraphs 12, 13, 14, 15, 16 and 17 of the pretrial stipulation (the foregoing omitted portion will be later discussed),

12. Paragraph XVII, omitting the second paragraph (p. 14 l. 13 to p. 14 l. 30),

13. Paragraph XVIII,

14. (Paragraph XIX will be later discussed),

15. Paragraph XXIII, omitting the conclusion, to be later discussed, beginning on p. 18, l. 9 to the end of the paragraph,

16. Paragraph XXIV, as amplified by Paragraph 23 of the pretrial stipulation, omitting from Paragraph XXIV the conclusion, to be later discussed, beginning on p. 18 l. 23, reading "and that the officials of the City of Los Angeles have arbitrarily, capriciously and unreasonably refused to adopt such an Ordinance",

17. (The conclusions in Paragraph XXV will be later discussed),

18. Paragraph XXVI, as amplified by Paragraph 24 of the pretrial stipulation.

SECOND CAUSE OF ACTION

I

The allegations of Paragraph II of the Second Cause of Action are not denied and will be found to be true.

II

The allegations of Paragraph III of the Second Cause of Action will be found to be true as to the respective contentions of the parties and as to the passage of the various ordinances therein set forth but without finding to be true the effect of any of said ordinances in permitting a continuation of a non-conforming use of the subject property or that a non-conforming use of the subject property existed after 1938.

III

The allegations of Paragraph IV of the Second Cause of Action will be found to be true to the extent that a justiciable controversy exists over the application of the various ordinances to the operation of the subject property for the extraction of rock, sand and gravel and that the parties are entitled to a determination of that controversy.

OTHER FINDINGS OF FACT

There have been left for discussion and determination the findings on other allegations of the complaint which will now be discussed and decided.

I

Paragraph VI of the complaint alleges in essence that the value of the subject property for the extraction of rock, sand and gravel as compared to its use for any other purpose, more particularly agricultural, residential, business, commercial or industrial use other than the production of rock, sand and gravel.

The subject property is substantially the apex of the Tujunga Cone, the second largest alluvial cone of rock, sand and gravel in the County of Los Angeles. The Tujunga Cone is generally known as the Tujunga Wash and is geologically typical of alluvial deposits created by streams as they debouch from the mountains onto the more level land permitting the deposit of rock, sand and gravel. The Tujunga Wash from the eastern to the western termini of the subject property is bordered on the north by the base of the mountains and on the south by bluffs of low hills except for relatively narrow plateaus on either side above the level of the wash. The composition of the subject property is the normal detritus found in alluvial cones consisting of rock, sand and gravel to a depth of approximately forty feet. The surface of the subject property is rough and uneven and scoured by irregular water courses. The major water course of the flood waters from the Tujunga Canyon passes longitudinally through the sub-

ject property. Other than by the expenditure of prohibitive amounts of money in the building of a flood control channel, the subject property serves and can only serve the purpose as a detritus spreading ground and retarding basin for flood water emerging from the Tujunga Canyon before they reach Hansen Dam. Physically it is possible, of course, to erect a structure on the surface of this deposit but due to the continuing flood hazard and the nature of the soil to contend that the subject property has any economic value for agricultural, residential, business, commercial or industrial use other than the extraction of rock, sand and gravel is preposterous. It cannot be gainsaid that the subject property could be used as a "wild-life" area in its natural state just as any other part of the surface of the earth, flat or mountainous undeveloped by human hands can be so used. It seems a fair inference that in establishing and developing the Hansen Flood Control Basin area that the eastern boundary thereof which is the western boundary of the subject property was determined to be the extent of the usable area of the Tujunga Wash justified by the purposes in creating the Hansen Basin both for flood control and for public use.

Notwithstanding the foregoing observations on the comparative use value of the subject property, it is established that "even assuming, ... that plaintiff's property would be more valuable if it were commercially zoned, such factor would not be determinative". (*Johnston* v. *City of Claremont*, 49 Cal. 2d 826, 839)

Paragraph VI of the complaint will be found to be true, adding thereto on page 5, line 32, the word "economic" before the word "value".

II

The foregoing observations apply also to Paragraph XIII of the complaint and the allegations therein will be found to be true subject to the following changes:

1. P.9 l.32 to read as follows: "That none of the subject property of plaintiffs has any appreciable economic value".

2. P.10 l.6—add the word "economic" before the word "value".

3. P.10 l.6—strike the end of the sentence reading "entirely and result in the practical confiscation thereof."

III

Paragraph XVI alleges a discrimination in the permitting of the Livingston Rock and Gravel Company operation on the 125 acres contiguous to the plaintiffs' property west of Foothill Boulevard. Foothill Boulevard divides the subject property both longitudinally and in acreage substantially in half. The subject property has an overall length of approximately 11,400 feet of which approximately 5,250 feet lie east of Foothill Boulevard. If plaintiffs' application had been limited to the area west of Foothill Boulevard and had been denied, a much stronger contention of unconstitutional discrimination could have been made. But plaintiffs' application was not so limited. There are substantial differences in the terrain and degree of development of the land south of and adjacent to the subject property east of Foothill Boulevard than west thereof. Viewing as we must "the character of the property of the objecting parties, the nature of the surrounding terrain, the use to which each has been put, recent trends of development" (*Lockard* v. *City of Los Angeles*, 33 Cal. 2d 453, 462), we cannot fail to observe but that the differences between the plaintiffs' entire parcel and the Livingston property are "fairly debatable" (*Lockard* v. *City of Los Angeles, supra*, p. 462) and when comparability is debatable we may not substitute our judgment for that of the legislative body. Particularly as to the subject property east of Foothill Boulevard and lying adjacent to the residential Sunland area, the statement in *Miller* v. *Board of Public Works*, 195 Cal. 477 at 495, is apposite:

> "Somewhere the line of demarcation will be drawn. And it is primarily the province of the municipal body to which the zoning function is committed to draw the line of demarcation, and it is neither the province

> nor the duty of the courts to interfere with the discretion with which such bodies are invested in the absence of a clear showing of an abuse of that discretion."

Plaintiffs cite and rely, inter alia, on *Reynolds v. Barrett*, 12 Cal. 2d 244, which involve the residential isolation of one lot surrounded on all sides by business. Obviously discrimination appeared but even there the court says at page 249:

> "The fact that nearby business property has the same characteristics as the parcel involved in the proceeding does not justify the court in substituting its judgment for the legislative judgment."

The decision therein was predicated upon the hypothesis "that reasonable minds cannot differ as to the arbitrary and discriminatory nature of the ordinance as applied to the particular parcel here involved" (p. 251).

Here, we believe, viewing the Livingston parcel and the subject property each in its entirety, reasonable minds can differ on the question of whether authority granted to operate one for the extraction of rock, sand and gravel and to deny the same operation to the other is arbitrary and discriminatory.

The Court cannot find a discriminatory application of the ordinance as alleged in Paragraph XVI.

IV

Paragraph XIX deals with the non-deleterious economic and hygienic effect of the operation of the subject property for the extraction of rock, sand and gravel on adjacent properties.

As to the public health of the community adjacent to the subject property, there is no question but that the Sunland-Tujunga area has a reputation as a haven for sufferers from respiratory symptoms and that the possible advent of a rock, sand and gravel operation near such residential area has caused considerable apprehension of air pollution. Un-

abated by water, rock and gravel extraction, crushing, screening, stock piling, loading and transportating would undoubtedly cause considerable dust. Properly controlled by water, as it is within the power of the legislative body to compel in the grant of such an application, it appears that the creation of dust for air-borne convection is and can be reduced to a point of pollution below an acceptable standard. Moreover, it was established to the Court's satisfaction that any such dust as would not be so eliminated would in any event be inorganic and not organic dust, the latter which primarily induces respiratory ailments. We must therefore conclude that the preservation of health in the Sunland-Tujunga area is a minimal basis for justifying a denial of the present application.

Certain noise from the operation is inevitable but again appears to be minimal. Increased trucking is likely but the points at which it would make the greatest impact on the surrounding areas would depend in large measure on the manner of handling the extraction operation. Danger to children, no matter how carefully the property is fenced, is of course, possible but probably no more so than many other places and types of structure which inevitably attract venturesome youths. Esthetically, it is undoubtedly true that an alluvial wash in its natural state is superior to pits therein. These are all factors which go into what plaintiffs denominate "the living amenities . . . of the inhabitants of adjacent properties" and which in their totality the legislative body may properly consider and act upon.

The value of the subject property for the production of rock, sand and gravel not only to plaintiffs but to the community it may have served by the Tujunga Cone is undebatable.

As has been repeatedly said that "courts may differ with the zoning authorities as to the 'necessity or propriety of an enactment' but so long as it remains a 'question upon which reasonable minds might differ', there will be no judicial interference with the municipality's determination of policy." (*Clemmons* v. *City of Los Angeles*, 36 Cal. 2d 95, 98)

"That reasonable minds have differed on the very problem before us we need only cite its history: disapproved by the Planning Commission Examiner, approved by the Director of Planning, approved by the Planning Commission, submitted without recommendation by the Planning Committee of the City Council and, finally, disapproved by the City Council. Mr. Gordon Whitnall, former Director of Planning of defendant City and called as a witness by the plaintiffs, testified, as is obvious, that the highest and best use of the subject property is for sand and gravel but he also very honestly testified that, in the last analysis, zoning depends upon human judgment and is not subject to exact measurement.

Counsel for plaintiffs properly concede that this is not a review of the wisdom of the legislative determination. In such a proceeding as this we are mindful of the adjuration that:

> "In passing upon the validity of legislation it has been said that 'the rule is well settled that the legislative determination that the facts exist which make the law necessary, must not be set aside or disregarded by the courts, unless the legislative decision is clearly and palpably wrong and the error appears beyond reasonable doubt from facts or evidence which cannot be controverted, and of which the courts may properly take notice.'" (*Lockard* v. *City of Los Angeles, supra*; 33 Cal. 2d 453, 461)

Paragraph XIX here under discussion contains certain allegations in terms of absolutes which the evidence will not support. The Court will make the following finding with respect to Paragraph XIX:

"That the business of excavating, removing, crushing and processing rock, sand and gravel and activities incidental and related thereto can be conducted on the plaintiffs' said property with compatibility to adjacent properties and with minimal detriment to the living amenities or health conditions of the inhabitants of adjacent properties or in the general area and without probable depreciation in property

values to the adjacent properties; that the use of plaintiffs' said property for the production of rock, sand and gravel is in the interests of the public necessity, convenience and welfare; that there remains available in the San Fernando Valley area in established Rock and Gravel Districts for future use and consumption in the City of Los Angeles only about eleven years supply of rock, sand and gravel and unless the production of such material is permitted by means of newly established rock and gravel Districts, when said supply is exhausted it will be necessary to import such material from distant points such as the San Gabriel alluvial cone at an increased cost to the consumers and public of the City of Los Angeles; that plaintiffs' said property is suitable primarily for the production of said materials and that if plaintiffs are not permitted to produce the same from said properties, such properties will be rendered economically valueless and in addition the public of the City of Los Angeles will have been deprived of benefits of a valuable natural resource."

V

We turn now to the last sentence of Paragraph XXIII of plaintiffs' complaint which essentially is a summation of plaintiffs' contentions in a series of allegations to the effect that the action of the City Council was (1) arbitrary, unreasonable and capricious, (2) unsupported by facts, (3) contrary to public necessity, convenience and welfare, (4) denied vested rights of use, and (5) constituted a confiscation of plaintiffs' property.

The Court has carefully considered the plaintiffs' able argument and the numerous authorities cited on both sides. This is not an appellate review and no useful purpose would be served by an extended discussion of such authorities and their applicability to the facts in hand. The situation here disclosed presents a close and difficult question, the final determination of which may fortunately rest in the hands of a court of review for as the Supreme Court says in *Lockard* v. *City of Los Angeles, supra,* at page 462:

> "The findings and conclusions of the trial court as to the reasonableness of a zoning ordinance are not

binding on an appellate court if the record shows that the question is debatable and that there may be a difference of opinion on the subject. The appellate courts look beyond such determinations and consider in some detail the basic physical facts appearing in the record, such as the character of the property of the objecting parties, the nature of the surrounding territory, the use to which each has been put, recent trends of development, etc., to ascertain whether the reasonableness of the ordinance is fairly debatable."

On the other hand, the trial court may not shun its original responsibility, which is judicial and not legislative, in reaching a decision. Having attempted to conscientiously and objectively equate the law and the evidence, the Court has reached a conclusion, not without misgiving as to its correctness, that it must find the allegations of the last sentence of Paragraph XXIII to be untrue.

VI

There is also reserved for consideration the allegation in Paragraph XXIV that the officials of the City of Los Angeles have arbitrarily, capriciously and unreasonably refused to adopt an ordinance permitting the use of the subject property for the extraction of rock, sand and gravel. In view of the foregoing discussions, the Court will find that allegation not true.

VII

The allegations of Paragraph XXV were likewise reserved for discussion. They are in effect a resume and summary of previous allegations already discussed and will be found to be untrue.

DETERMINATION OF SECOND CAUSE OF ACTION

The Second Cause of Action hypothecates that notwithstanding the application of plaintiff filed on or July 3, 1958, with the City Planning Commission requesting that the subject property be included in a rock and gravel

district and reciting that it is presently zoned A-1, A-2 and RA, the final denial of which application is the subject of the First Cause of Action; that the subject property by reason of previous alleged exceptions or non-conforming uses was and is exempt from the operation of certain restrictive ordinances.

Superficially, the two causes of action appear to be inconsistent in that in the first cause the plaintiffs' position by applying for a variance necessarily concedes the existence of a restriction on use, whereas in the second cause the contention that no restriction presently exists hence the use sought to be made of the subject property is not subject to injunction.

The existence or non-existence of a legally effective restrictive ordinance or the existence of an existing exception to a restrictive ordinance is not governed by the recitations in plaintiffs' application for a variance. If, legally because of an existing non-conforming use status, the subject property was not subject to a restrictive use ordinance, the implied concession in the application did not waive any existing status rights. Hence, notwithstanding the application for a variance, plaintiff is entitled to urge that presently no conditional use authorization is required so as to permit the use of the subject property for the desired purposes.

Irrespective of intersecting street easements, changes of leases and lessees, it can be held that until about 1935, the subject property was part of one contiguous property upon some part or parts of which rock, sand and gravel was being extracted. It is clear that whatever operations of such extractions were occurring on the subject property in connection with the operation of the Sheldon Plant, that such active operations ceased about 1935 and that no such operations on the subject property were being carried on when the Hansen Dam condemnation proceedings in 1939 severed the total fee and leasehold estates. Concededly, no active operations on the subject property have occurred since 1939.

Assuming that until the adoption of Ordinance No. 74,140 in 1934 that the subject property was not included within a residential district restriction of the defendant City, it is clear that unless within a variance provision therein, the subject property was included and established as a residenial district. The subject ordinance (Section 4(d)) provided, inter alia, that such portions of the City as had been previously excepted from the Residence District should be considered as having been granted a variance "but only so far as such variance is necessary to permit the use . . . for the particular purpose for which the original exception was granted as shown by the records of the case on file . . ." There is no evidence that any "original exception" was ever granted to operate the subject property for the extraction of rock, sand and gravel and hence the exception provision above referred to was inoperative to exclude the subject property from the residential restriction use provided by said ordinance. The same ordinance did provide for the continuance of non-conforming uses but expressly provided that such status should be deemed discontinued and abandoned upon any cessation of such non-conforming use for a period of 60 days. Hence, assuming the existence of a non-conforming use status, but not an exception, at the time of the adoption of said Ordinance No. 74,140 in 1934, by reason of the complete cessation of such use on the subject property in 1935, there too terminated any non-conforming use status. The provisions of Section 16.01 to 16.05 of the Municipal Code by Ordinance No. 77,000 adopted in 1936 are substantially the same as Ordinance No. 74,140 above discussed. The non-applicability of the exception section (16.05d) is the same as Ordinance No. 74,140 and in 1936 there was no operation of such property to bring it within the non-conforming use clause (Sec. 16.04).

The "Comprehensive Zoning Plan of the City of Los Angeles" was adopted by Ordinance No. 90,500 in 1946. It is conceded that unless otherwise exempt from the zones established thereby the subject property is zoned therein as A-1, A-2 and RA. Section 12.24-B9 provides that certain

uses (including development of natural resources other than drilling for oil) "existing at the time this Section became effective" shall be deemed to have been approved for conditional use. Whatever rights, if any, plaintiffs had to be exempt from the provisions of any previous zoning ordinances were in any event terminated by the Comprehensive Zoning Plan in 1946 and it is clear that the use of the subject property for the "development of natural resources" was not a use thereof "existing at the time" the Zoning Plan became effective.

Conclusions

Appropriate conclusions of law from the foregoing findings of fact will include:

1. That no injunction issue enjoining the defendant from enforcing the ordinances prohibiting the extraction of rock, sand and gravel from the subject property;

2. That plaintiffs are not lawfully entitled to use the subject property for the uses and purposes described in Paragraph III of plaintiffs' complaint;

3. That it be declared that the subject property does not have a conditional use status for the development of natural resources;

4. That plaintiffs take nothing by their complaint and that defendant have its costs of suit.

Counsel for defendant will prepare findings of fact, conclusions of law and judgment not inconsistent with this Memorandum Decision. In view of the possible complexity in preparation of the findings, it would be the Court's suggestion that counsel for both parties cooperate in such preparation and if there develop areas of uncertainty or misunderstanding of this decision, that counsel confer with the Court, it being the intent and desire of the Court to make a full, complete and honest set of findings so as to preserve plaintiffs' right to a fair review by the appellate courts.

APPENDIX D

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

L.A. No. 26566

CONSOLIDATED ROCK PRODUCTS COMPANY and VALLEY REAL ESTATE COMPANY, *Plaintiffs and Appellants*

vs.

CITY OF LOS ANGELES, *Defendant and Respondent.*

On appeal from the Superior Court in and for the County of Los Angeles Superior Court #714884

The above entitled cause having been heretofore fully argued, and submitted and taken under advisement, and all and singular the law and premises having been fully considered,

IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the

Judgment

of the Superior Court in and for the County of Los Angeles in the above entitled cause, be and the same is hereby affirmed.

Respondent to recover costs on appeal.

I, WILLIAM I. SULLIVAN, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above entitled cause on the 12th day of April, 1962, and now remaining of record in my office.

WITNESS my hand and the seal of the Court, affixed at my office, this 14th day of May, A.D. 1962.

WILLIAM I. SULLIVAN,
Clerk

By R. FORMICKI,
Deputy

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FILED
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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962
No. 307

CONSOLIDATED ROCK PRODUCTS COMPANY and VALLEY REAL ESTATE COMPANY,

Appellants,

vs.

CITY OF LOS ANGELES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION TO DISMISS.

ROGER ARNEBERGH,
City Attorney,
BOURKE JONES,
Assistant City Attorney,
CLAUDE E. HILKER,
Assistant City Attorney,
400 City Hall,
Los Angeles 12, California,
Attorneys for Appellee, City of Los Angeles.

TABLE OF AUTHORITIES CITED

CASES	PAGE
Buck v. People of the State of California, 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775	13
Consolidated Rock Products Company, etc., et al. v. City of Los Angeles, 57 A. C. Rep. 557, 370 P. 2d 342	2
Euclid v. Ambler Realty Company, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303	10
Goldblatt v. Town of Hempstead, 369 U. S. 590	11
Hammerstein v. Superior Court of California, 340 U. S. 622, 71 S. Ct. 521, 95 L. Ed. 586	13
House v. Road Improvement District No. 2, 266 U. S. 175, 45 S. Ct. 60, 69 L. Ed. 229	14
Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P. 2d 38, cert. den. 337 U. S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744	10
Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381, app. dism. 273 U. S. 781, 47 S. Ct. 460, 71 L. Ed. 889	11
Mugler v. Kansas, 123 U. S. 623, 8 S. Ct. 273, 31 L. Ed. 205	11
Parker v. McLain, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051	9, 14
Robinson v. City of Los Angeles, 146 Cal. App. 2d 810, 304 P. 2d 814	11
Sproles v. Binford, 286 U. S. 374, 52 S. Ct. 581, 76 L. Ed. 1167	10
Stembridge v. State of Georgia, 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130	13
United States Fidelity & Guaranty Co. v. State of Oklahoma, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876	14

PA

Valley Steamship Co. v. Wattawa, 244 U. S. 202, 37 S. Ct. 523, 61 L. Ed. 1084 .....

Zorach v. Clauson, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954 .....

Zucht v. King, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194 .....

he Court reiterates its expression of a
thorough and able preparation, present
by both sides in this case.

y 25, 1960.

PHILIP H. RICHARDS
Judge of the Superior

SUBJECT INDEX

PAGE

Statement of facts 2

I.

The judgment appealed from rests upon an adequate non-federal basis 8

II.

The instant appeal does not present a substantial federal question 13

Conclusion 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. .....

CONSOLIDATED ROCK PRODUCTS COMPANY and VALLEY REAL ESTATE COMPANY,

Appellants,

vs.

CITY OF LOS ANGELES,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

MOTION TO DISMISS.

The appellee, City of Los Angeles, a municipal corporation, hereby moves to dismiss the appeal heretofore filed with this Honorable Court by Consolidated Rock Products Company and Valley Real Estate Company. Such motion is based upon the following grounds:

1. The judgment appealed from rests upon an adequate non-federal basis.

2. The appeal does not present a substantial federal question.

The Jurisdictional Statement filed by appellants herein wholly omits from its summation of facts sev-

eral very important facts which omissions it is necessary to indicate and correct before we can properly discuss and elaborate upon each of our above mentioned grounds in support of our Motion to Dismiss.

Statement of Facts.

The following statement of facts is based upon the factual statement of the California Supreme Court, as set forth in its opinion (*Consolidated Rock Products Company, etc., et al. v. City of Los Angeles*, 57 A. C. Rep. 557; 370 P. 2d 342—Appendix A of appellants' Jurisdictional Statement). The facts stated therein were essentially a reiteration of the findings of fact and Memorandum Decision of the trial court (Appendix C of appellants' Jurisdictional Statement) and of the factual summation of the District Court of Appeal, Second Appellate District (15 Cal. Rptr. 775—Appendix B of appellants' Jurisdictional Statement). For the convenience of this Honorable Court, references to portions of the Memorandum Decision of the trial court, of the decision of the District Court of Appeal and of the decision of the California Supreme Court will be made by referring to the appropriate appendix and page number within the appellants' Jurisdictional Statement wherein those decisions are set forth.

The present controversy arose when appellants requested the City of Los Angeles to amend its zoning laws so as to permit them to conduct rock and gravel extraction operations upon the subject property in addition to the already permitted agricultural uses, which request was denied. Appellants then instituted the present action seeking to have the city's zoning ordinance declared invalid and to enjoin the enforce-

ment thereof insofar as it prohibited them from conducting rock and gravel extraction operations upon the subject property. Both the trial court and the California Supreme Court ruled against appellants and upheld the constitutionality of the applicable zoning regulations.

The subject property consists of approximately 348 acres of land owned by appellant Valley Real Estate Company and leased to the appellant Consolidated Rock Products Company. The subject property lies upstream from Hansen Dam in the San Fernando Valley portion of the City of Los Angeles and is in the center of what is commonly known as the Tujunga Wash (App. A, p. 1a). Such property is about two miles long in a generally east-west direction and is divided approximately in the middle by Foothill Boulevard running at that point in a generally north-south direction. The Tujunga Wash is bounded on its northerly side by the base of mountains and on its southerly side by bluffs of low hills, except for relatively narrow plateaus which overlook it from both sides (App. A, p. 1a).

The subject property is zoned to permit primarily agricultural uses including the raising of animals (App. A, pp. 2a and 15a). The limited rock and gravel extraction operations which had previously been conducted upon a small portion of the subject property as a nonconforming use had been *voluntarily terminated* in about 1935 (App. A, p. 19a) and had *not* been terminated by reason of the institution of the 1939 condemnation proceedings for the adjacent Hansen Dam debris basin by the Los Angeles County Flood Control District as intimated by appellants (Jur. St. pp. 5 and 6).

Hansen Dam and its debris basin and recreation area lie to the west of the subject property at the mouth of the Tujunga Canyon. Although appellants point out that other extraction "operations are presently conducted on other land adjoining the subject property" (Jur. St. p. 7), they *fail* to point out that such other operations are limited to a relatively small 125 acre parcel of land on the south side of the *westerly* portion of the subject property (and thus far removed from the adjoining communities), that such 125 acre parcel is not in the center of the wash like the subject property but is in a side pocket formed by the hills and thus its dust is less subject to being stirred and carried by the winds in the Tujunga Wash, that such operations have been conducted since 1931, that such property is substantially depleted and has a doubtful number of remaining years of operation left, that all other rock and gravel operations in the Tujunga Wash have been confined to the area *downstream* from Hansen Dam and that the City of Los Angeles since 1946 has not granted any new rock and gravel districts *upstream* from Hansen Dam (wherein lies the subject property) but, on the contrary, has specifically denied the application for the creation of a new rock and gravel district upon other premises upstream from Hansen Dam immediately adjacent to the subject property (App. A, pp. 2a and 17a).

The twin residential communities of Sunland and Tujunga adjoin the subject property, the more heavily developed portions of those communities lying easterly and southeasterly of the subject property. Appellants have again failed to mention, however, the further fact that in recent years the trend of development of these

communities has been in a westerly direction toward the subject property and along and upon the bluffs northerly and southerly thereof (App. A, p. 2a).

The California Supreme Court in its opinion specifically noted the findings of the trial court (App. A, pp. 3a and 4a) that "the Sunland-Tujunga area has a national reputation as a haven for sufferers from respiratory ailments" (mentioned by appellants); that such area "is inhabited by many such sufferers" (not mentioned by appellants); that "a considerable portion of its economy is based upon such reputation" (not mentioned by appellants); that "a rock and gravel operation upon the subject property could adversely affect the reputation of the Sunland-Tujunga area as a haven for sufferers from respiratory ailments" (mentioned by appellants); and that "There was substantial evidence that even though operated with all possible safeguards, the extraction of sand and gravel from the subject property would still create appreciable quantities of dust, which would be carried by the prevailing winds to the residences and sanitariums of Sunland and Tujunga; that this dust would have a damaging effect upon the sufferers from respiratory ailments; and also that such operations would adversely affect property values in those communities" (not mentioned by appellants).

The trial judge, after hearing all the evidence and after personally viewing the premises and the surrounding area first expressed his *own* view that, if strictly regulated, rock and gravel operations could be conducted upon the subject property with minimal detrimental effect upon the adjoining areas, but then *specif-*

ically found that "reasonable minds might differ and have differed" upon the various factors leading to such a conclusion (App. A. p. 3a) and therefore refused to substitute his own personal opinion for that of the city legislative body and upheld the refusal of the city to rezone the subject property so as to permit rock and gravel extraction operations thereon (App. A. p. 17a).

Although appellants have gone to great lengths in their Jurisdictional Statement to suggest to this Court that the City of Los Angeles was somehow attempting to misuse its zoning authority to preserve the subject property as a "park" or "natural preserve" or "retarding basin" in conjunction with Hansen Dam (Jur. St. pp. 13 and 24) one need only to read the pleadings, the briefs and the decisions of the state courts in this matter to see that this is a desperation attempt to create a false issue. Such an issue was never seriously urged by appellants in the state courts nor did those courts ever find any necessity to discuss or pass upon such a contention. The basic questions *actually* raised, discussed and answered in the trial and appellate courts below were the following:

1. Is the doctrine that where reasonable minds may differ as to the propriety or necessity for particular legislation, the court will not substitute its judgment for that of the legislative body, applicable in testing the validity of zoning legislation which prohibits operations for the extraction of rock and gravel from land

which allegedly has no other economic value? (App. A. p. 7a.)

2. Was there substantial evidence presented including the possible adverse effect of rock and gravel operations conducted on the subject property upon the health and welfare of the adjoining communities, to support the legislative determination as to the necessity, propriety and reasonableness of retaining the subject property in the agricultural zone and refusing to permit rock and gravel extraction operations thereon? (App. A. pp. 9a and 17a.)

3. Was there such a difference between the proposed rock and gravel operation on the subject property and that being conducted on an adjacent parcel of property as to refute the allegations of discrimination? (App. A. pp. 2a and 17a to 19a.)

4. Do the ordinances which have applied and which now apply to the subject property prohibit rock and gravel operations thereon (or do they, as contended by appellants, by a series of exemptions explicitly permit such operations thereon)? (App. A. pp. 19a and 20a.)

The California trial court and Supreme Court determined, and we submit correctly so, that the answer to each of the above questions was "yes".

I.

The Judgment Appealed From Rests Upon an Adequate Non-Federal Basis.

Appellants herein have stated the two questions which they present to this Honorable Court (Jur. St. p. 5) as:

> "1. Whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effect a taking of real property without compensation therefor in violation of the Due Process Clause of the Fourteenth Amendment?
>
> "2. Whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable, where that use will not adversely affect the health, safety or welfare of other persons or property, constitute arbitrary and unreasonable exercises of the state police power in violation of the Due Process Clause of the Fourteenth Amendment?"

With respect to the first question, such question erroneously assumes that the Los Angeles zoning ordinances which place the subject property in an agricultural zone "altogether destroy the worth of valuable land". Appellants forget that the trial court went to great lengths to point out that because of its location in an occasionally active wash, the land in question had no other "economic" value than for rock and gravel quarrying but specifically negated appellants' allegations that it had no other value at all (App. C. pp. 39a and 40a). The California Supreme Court likewise recognized this distinction and recognized that the sub-

ject property could be put to some use and had some value, although "relatively small if not minimal," other than for rock and gravel operations (App. A, pp. 14a and 15a).

With respect to the second question posed by appellants, it not only contains the erroneous statement of the first question as discussed above, but it further erroneously assumes that the proposed rock and gravel extraction operation "will not adversely affect the health, safety or welfare of other persons or property." Appellants pose such question with apparent disregard for the California Supreme Court declarations that "There was substantial evidence that even though operated with all possible safeguards, the extraction of sand and gravel from the subject property would still create appreciable quantities of dust, which would be carried by the prevailing winds to the residences and sanitariums of Sunland and Tujunga; that this dust would have a damaging effect upon the sufferers from respiratory ailments; and also that such operations would adversely affect property values in those communities" (App. A, p. 4a) and that "having found on substantial evidence that the necessity and propriety of the legislative action in this case is one upon which reasonable minds may differ, the trial court properly found in favor of the ordinance's constitutionality." (App. A, p. 17a).

Thus it can be seen that the appellants' claim of the denial to them of certain federal constitutional rights is based upon their own erroneous assumptions of the facts involved.

As was stated in *Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051, a federal question

resting on false assumptions is without merit and affords no basis for review by the United States Supreme Court.

We submit that in any event the opinion of the California Supreme Court on those non-federal factual questions discussed above renders unnecessary a specific determination upon the federal questions urged herein by appellants and provides an adequate non-federal basis upon which the judgment of the California Supreme Court may be sustained.

The well settled law in this country is that the validity of legislation must be determined by the application to the facts of the so-called "reasonable minds" test. This was stated by the United States Supreme Court in the early and leading zoning case of *Euclid v. Ambler Realty Company*, 272 U. S. 365 (47 S. Ct. 114, 71 L. Ed. 303) at page 388:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

This thought was reiterated in *Sproles v. Binford*, 286 U. S. 374 (52 S. Ct. 581; 76 L. Ed. 1167), where it was stated at page 388 that:

> ". . . debatable questions as to reasonableness are not for the courts but for the legislature."

This principle has been echoed and followed by state courts throughout the nation in hundreds of zoning decisions since those early declarations, including the California courts (*Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 461, 202 P. 2d 38, Petition for Writ of Certiorari to the Supreme Court of California denied—337 U. S. 939, 69 S. Ct. 1516, 93 L. Ed. 1744; *Miller*

v. Board of Public Works, 195 Cal. 477, 490, 234 Pac. 381, appeal dismissed—273 U. S. 781, 47 S. Ct. 460, 71 L. Ed. 889; *Robinson v. City of Los Angeles*, 146 Cal. App. 2d 810, 815, 304 P. 2d 814).

Whether the facts in the present case were such that reasonable minds might differ as to the necessity and propriety and reasonableness of the agricultural zoning of the subject property was purely a factual determination which was thoroughly argued and considered and ruled upon by the state courts in the instant case (App. A, p. 17a) and was, we submit, determinative of the case.

The fact that, as appellants contend, the prohibition of the extraction of rock and gravel from the subject property destroys the "economic" value thereof is not determinative. No one contends that rock and gravel operations would not be the most profitable use to which appellants could put the land. As the California Supreme Court pointed out, however, such land has use and value for other purposes, albeit "relatively small" (App. A, p. 15a). In a similar case this court stated in *Goldblatt v. Town of Hempstead*, 369 U. S. 590, involving the validity of an ordinance prohibiting dredging below a certain depth:

> "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional."

Legislative restrictions to protect the public health and safety were approved in *Mugler v. Kansas*, 123 U. S. 623 (8 S. Ct. 273, 31 L. Ed. 205), wherein it was stated at pages 668 and 669:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests. . . . The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition, that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community."

It can readily be seen that the subject property, located as it is in an active wash, can be reasonably zoned only for agricultural purposes and not at all for residential, or commercial or manufacturing purposes. At least it has *some* value for uses permitted in that zone, although "relatively small." It would probably have *no* value at all for uses permitted in the other three primary zones. It is apparent that appellants' difficulty arises, not from the *zoning* of the subject property, but from the marginal nature and physical characteristics of the land itself. We submit that the law does not require, as appellants contend, that they

be rewarded for having acquired land of the most marginal sort by thereby being permitted to conduct their extraction operation thereon irrespective of its effect upon the adjoining communities and their inhabitants.

The law is clear that the United States Supreme Court will not take jurisdiction of a matter where the judgment of the state court could be supported upon an adequate non-federal ground. (*Stembridge v. State of Georgia*, 343 U. S. 541, 72 S. Ct. 834, 96 L. Ed. 1130; *Buck v. People of the State of California*, 343 U. S. 99, 72 S. Ct. 502, 96 L. Ed. 775; *Zorach v. Clauson*, 343 U. S. 306, 72 S. Ct. 679, 96 L. Ed. 954; *Hammerstein v. Superior Court of California*, 340 U. S. 622, 71 S. Ct. 521, 95 L. Ed. 586). It is submitted that adequate non-federal grounds exist in the instant case to support the judgment of the California Supreme Court and that this Honorable Court should therefore refuse jurisdiction of and dismiss this appeal.

II.

The Instant Appeal Does Not Present a Substantial Federal Question.

It is submitted that it is evident from a reading of the pleadings in the trial court, the briefs in the appellate court and the decisions of the trial and appellate courts that the within matter was tried and determined primarily upon the factual issues set forth in paragraph I, above, and that the questions involving the federal constitution urged by appellants herein were incidental to the determination of such factual issues. It is submitted that under such circumstances such questions should not be considered substantial federal ques-

tions upon which to base an appeal to this Honorable Court (*Parker v. McLain*, 237 U. S. 469, 35 S. Ct. 632, 59 L. Ed. 1051; *Zucht v. King*, 260 U. S. 174, 43 S. Ct. 24, 67 L. Ed. 194; *Valley Steamship Co. v. Wattawa*, 244 U. S. 202, 37 S. Ct. 523, 61 L. Ed. 1084; *United States Fidelity & Guaranty Co. v. State of Oklahoma*, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876; *House v. Road Improvement District No. 2*, 266 U. S. 175, 45 S. Ct. 60, 69 L. Ed. 229).

Conclusion.

For each and every of the reasons set forth above it is respectfully submitted that the within appeal to this Honorable Court should be dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,

BOURKE JONES,
Assistant City Attorney;

CLAUDE E. HILKER,
Assistant City Attorney,

Attorneys for Appellee, City of Los Angeles.

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No. 207

Supreme Court of the United States

October Term, 1962

Consolidated Rock Products Company and Valley Rock Estate Company, *Appellants*,

v.

City of Los Angeles, *Appellee*.

BRIEF FOR APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

Howard C. Westwood
Charles V. Miller
701 Union Trust Building
Washington 5, D. C.

Donald M. Dunn
233 W. Seventh Street
Los Angeles 14, California

Attorneys for Appellants
Consolidated Rock Products Co.
and Valley Rock Estate Co.

Covington & Burling
Of Counsel

September 20, 1962

Supreme Court of the United States

OCTOBER TERM, 1962

No. 307

CONSOLIDATED ROCK PRODUCTS COMPANY and VALLEY REAL ESTATE COMPANY, *Appellants*,

v.

CITY OF LOS ANGELES, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR APPELLANTS IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

I.

The appellee's Motion to Dismiss is founded on a plain misstatement of the record.

The appellee contends that neither of the two questions posed in the Jurisdictional Statement raises a substantial issue. This is because—so appellee says—the findings of fact below establish that the appellants' land "could be put to some use and had some value" despite the challenged zoning. (Motion, pp. 9, 11). Therefore, the appellee argues, this is but the familiar case of zoning that prevents a particular valuable use but permits other, albeit less valuable, uses; and in such a case the courts will not interfere

with the legislative judgment. Indeed, appellee ventures so far as to urge that the case is determined by the principle that an ordinance which merely "deprives the property of its most beneficial use" is not thereby rendered unconstitutional. (Motion, p. 11).

But this is no such case.

The appellee's contention that appellants' land was found to have "some use" and "some value" under the challenged zoning is based, paradoxically, on the trial court's determination that the land, so zoned, has no "economic value." By insisting on the qualifying adjective "economic", the trial court "specifically negated appellants' allegations that it had no other value at all," according to the appellee, citing App. C, pp. 39a-40a, of the Jurisdictional Statement. (Motion p. 8).

There is a studied failure, in the Motion, to state what the "other value" is. But it is necessary only to turn to the appellee's citation to discover it. Doing so dissolves the basis upon which the entire Motion is constructed.

App. C, pp. 39a-40a, of the Jurisdictional Statement, cited by the appellee, sets forth the trial court's determination that the property, under the challenged zoning, has no economic value. The court found that "due to the continuing flood hazard and the nature of the soil to contend that the subject property has any economic value for agricultural, residential, business, commercial or industrial use other than the extraction of rock, sand and gravel is preposterous."

That determination immediately follows a sentence holding that the property "can only serve the purpose

as a detritus spreading ground and retarding basin for flood water[s] emerging from the Tujunga Canyon before they reach Hansen Dam." And it immediately precedes a sentence pointing out that "the subject property could be used as a 'wild-life' area in its natural state just as any other part of the surface of the earth, flat or mountainous undeveloped by human hands can be so used."

Thus, the trial court did find that the property has some value. It has value as a detritus spreading ground for the Hansen Dam flood control system and as a "wild-life" area, *i.e.*, value as a park—the use to which the City Council was so strongly urged to devote the property. In other words, the land does have value, under the challenged zoning, *to the public*.

But it has no value *to the owners*.

This is what the trial court found when it determined that the property had no "*economic* value."

Hence we are returned to the two questions posed in the Jurisdictional Statement. They cannot be dodged. They are most substantial.

The appellee attempts to evade the questions by twice stating that the California Supreme Court considered the property to have "some value" for purposes other than rock, sand and gravel operations despite the challenged zoning. (Motion, pp. 8-9, 11). For this statement the Motion refers to App. A, pp. 14a-15a, of the Jurisdictional Statement. But this reference discloses that the court said nothing of the sort. The reference is to the passage in the court's opinion wherein it merely recited that "there was testimony before the legislative body" that the prop-

erty could be devoted to other uses. As the Jurisdictional Statement shows, this recital is a very plain mistake. (Juris. St., pp. 17-18). Moreover, it was not offered as a rejection of the trial court's very firm finding of fact; on the contrary the recital was accompanied by a concession showing that the admitted "seasonal flooding" is hardly consistent with such purported testimony. (Juris. St., p. 17; Juris St., App. A, p. 15a).

The appellee's dodge, therefore, does not succeed.

II.

The Motion to Dismiss makes a subsidiary contention that the second question posed by the Jurisdictional Statement lacks substance. This contention is based upon a declaration by the California Supreme Court that "there was substantial evidence" that dust from appellants' proposed operations would have "a damaging effect" upon sufferers from respiratory ailments in the neighborhood. (Motion, p. 9).

The answer to the appellee's contention is that a mere declaration that there was such evidence in the record—though the fact was found by the trial court to be contrary to that evidence (Juris. St., p. 10)—does not exhaust the inquiry demanded by the Fourteenth Amendment and the decisions of this Court. Particularly is this so where, as here, a quarrying operation has for years been in operation on an immediately adjacent property more than one third as large as the property of the appellants, and the appellee's own expert admitted at the trial that the appellants' proposed operation could be conducted with no greater "carry of dust" than from the existing opera-

tion. (Tr. 726; see also Tr. 521-22; *cf.* Juris. St., p. 23, n. 6). The expert's admission makes doubly significant the appellee's failure to challenge the proposition, supported by the trial court's finding of fact, that the City, by appropriate regulation and restrictions, could prevent any objectionable effects of the proposed operation. (Juris. St., pp. 21-22). This Court's decisions have most pointedly insisted upon an appraisal of such a proposition, *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594-95 (1962); and most clearly the California Supreme Court failed to make that appraisal. (Juris. St., p. 22).

Indeed the gross inadequacy of the lower court's Constitutional inquiry is highlighted by one point made in the Motion that the appellee apparently deems of importance—that is, that the adjacent property on which quarrying operations are presently conducted is "far removed from the adjoining communities." (Motion, p. 4). But roughly half of the appellants' property is as far or further removed from these communities. (Juris. St., App. C, p. 40a). Even if the City might validly prohibit the proposed operations on an easterly portion of the property, it does not follow that it may prohibit them on the *entire* property which is more than two miles long. (Juris. St., App. C, p. 40a).

III.

The appellee's Motion emphasizes the California Supreme Court's affirmance of the trial court's determination that "reasonable minds" might differ on the challenged zoning. But it neglects to mention the point about which there might be such reasonable difference.

INDEX OF CITATIONS

	Page
Goldblatt v. *Town of Hempstead*, 369 U.S. 590 (1962)	5
Griggs v. *Allegheny County*, 369 U.S. 84 (1962)	7
United States v. *Causby*, 328 U.S. 256 (1946)	7
Fairfax County [Virginia] Planning Division, *A Natural Resources Development Plan*, 1961	6

The trial court first determined that the appellants' proposal, properly regulated by the City, posed no threat to health or property values. In the following paragraph it noted that there might be "certain noise," that danger to children would probably be no more than in many other circumstances, and that "esthetically" a natural alluvial wash is "superior" to excavation therein—and that "*these* are all factors" (emphasis added) that a legislative body might "properly" consider. (Juris. St., App. C, p. 42a). The trial court then concluded that "reasonable minds have differed" on the propriety of the zoning since there were differences between the City Planning Commission's Examiner, then the Commission, and then the City Council. (Juris. St., App. C, p. 43a; and see the California Supreme Court's similar point, Juris. St., A, p. 3a, n. 1).

But this is merely to say—that reasonable minds might differ as to whether it would be more in the public interest to have the property confined to a park and wild-life area than to permit the extraction of rock, sand and gravel needed by the community—the controversy that was determined by the legislative body.[1]

We agree that reasonable minds might differ on *that* issue.

---

[1] However, these uses may be, in fact, complementary. (Juris. St., pp. 14-15, n. 4). Means are available to satisfy the public's need for rock, sand and gravel as well as its desire for parks. For example, programs have been adopted for excavation of natural resources for a limited period with concurrent reclamation of the worked property. (*See e.g.*, Fairfax County [Virginia] Planning Division, *A Natural Resources Development Plan*, 1961).

But if the legislative body resolves that issue in favor of the proponents of a park area—as it did in this case—the Fourteenth Amendment requires compensation.

That is the question pointedly ignored by the appellee, just as it was ignored or erroneously answered (see Juris. St., pp. 16-17) by the lower court.

The decisions of this Court do not permit that question to be ignored. Appellants' property has been "taken" in the Constitutional sense even though they are left with bare possession and the duty to pay taxes. *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962); *United States* v. *Causby*, 328 U.S. 256 (1946).

Appellee's Motion to Dismiss should be denied.

Respectfully submitted,

HOWARD C. WESTWOOD
CHARLES A. MILLER
701 Union Trust Building
Washington 5, D. C.

DONALD J. DUNNE
215 W. Seventh Street
Los Angeles 14, California

Attorneys for Appellants Consolidated Rock Products Co. and Valley Real Estate Co.

COVINGTON & BURLING
Of Counsel

September 20, 1962